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No. ———

Supreme Court, U.S.
FILED
JAN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Should the doctrine of sovereign immunity be extended to bar a court order requiring the government to pay interest on regulatory relief unlawfully delayed, when the interest would be paid from funds held by the government only as custodian for the benefit of rightful claimants under a regulatory program, and not from public funds?

2. Even if the doctrine of sovereign immunity were applicable to the court order described in question No. 1, does the 1976 amendment to § 702 of the Administrative Procedure Act, abolishing the defense of sovereign immunity in actions against the government for relief other than money damages, permit a court to order the payment of interest on regulatory relief unlawfully delayed by the government?

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UNITED STATES DEPARTMENT OF ENERGY and
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioners VGS Corporation, d/b/a Southland Oil Company, and Globe Asphalt Co., Inc. ("Southland")[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals entered in this proceeding on December 9, 1986.

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[1] Pursuant to Rule 28.1 of the Rules of this Court, petitioners inform the Court that Globe Asphalt Co., Inc. is a wholly-owned subsidiary of VGS Corporation. VGS Corporation is a majority-owned subsidiary of Galaxie Corporation. Lamar Life Corporation also is a majority-owned subsidiary of Galaxie Corporation.

OPINIONS BELOW

The Memorandum Opinion and Order issued by the United States District Court for the Southern District of Mississippi on July 12, 1985 is reported at 613 F. Supp. 243 (S.D. Miss. 1985) and is reproduced in the Appendix at 11a. The Memorandum Opinion and Final Judgment of that Court are unreported and are reproduced in the Appendix at 21a and 26a respectively. The opinion of the Temporary Emergency Court of Appeals, entered on December 9, 1986, is reported at 4 Energy Mgmt. (CCH) ¶ 26,572 (1986) and is reproduced in the Appendix at 1a.

JURISDICTION

The Judgment of the Temporary Emergency Court of Appeals was entered on December 9, 1986, this petition for certiorari being filed within thirty days of that date. This Court's jurisdiction is invoked under § 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1982), as incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754 (1982).

STATUTORY PROVISIONS INVOLVED

Section 504 of the Department of Energy Organization Act, 42 U.S.C. § 7194 (1982), is reproduced in the Appendix at 30a. Section 702 of the Administrative Procedure Act, as amended, 5 U.S.C. § 702 (1982), is reproduced in the Appendix at 32a.

STATEMENT OF THE CASE

This case involves the use of the sovereign immunity doctrine to bar courts from ordering complete relief from governmental misconduct in the administration of a regulatory program. The relief at issue was in the form of interest on regulatory benefits unlawfully delayed, to be paid not from public funds, but from funds held by the government solely for the benefit of rightful claimants under the regulatory program. This case raises fundamental issues about the metes and bounds of the sover-

eign immunity doctrine as it affects the full accountability of a federal agency for its regulatory misconduct.

A. The Entitlements Program And Exception Relief

Pursuant to the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 753(a) (1982), between 1974 and 1981, the Federal Energy Administration ("FEA") and, subsequently, the Department of Energy ("DOE"), administered a system of crude oil price controls, under which domestic crude oil (subject to price controls) was substantially less expensive than imported crude oil (not subject to controls). *See* 10 C.F.R. § 212.78 (1986). To address the competitive disadvantage suffered by refiners with less-than-average access to the less expensive domestic crude oil, the FEA established the Entitlements Program. 10 C.F.R. § 211.67 (1986); 39 Fed. Reg. 42246 (Dec. 4, 1974). Under the Entitlements Program, each month refiners with greater-than-average access to price-controlled crude oil were required to make cash transfer payments, through the purchase of "entitlements," to other refiners with lower-than-average access to such crude oil. The rights and liabilities of each refiner under the Program were set out in monthly "entitlements notices" issued by the government. The cash transfers mandated by the Program were strictly between refiners; no funds flowed to or from the government.

Under § 504(a) of the Department of Energy Organization Act, DOE was required to make "adjustments" to the EPAA controls, including the Entitlements Program, where necessary to alleviate "special hardship, inequity, or unfair distribution of burdens" caused by the regulatory program. 42 U.S.C. § 7194(a) (1982). These "adjustments" became known as "exceptions" and agency action under this section as "exception relief". Applications for exception relief were first considered by DOE's Office of Hearings and Appeals ("OHA"); OHA denials of relief were then appealable to the Federal Energy Regulatory Commission ("FERC"), an independent regulatory body. *See* 42 U.S.C. § 7194(b)(2) (1982); 42 U.S.C.

§ 7171(a) (1982). While the Entitlements Program was operating, final OHA or FERC orders granting exception relief were implemented promptly on the next monthly entitlements notice. Such orders either increased the number of entitlements the recipient refiner could otherwise sell, or reduced the number it otherwise was required to purchase.

B. Crude Oil Decontrol And Its Aftermath

On January 28, 1981 President Reagan, by Executive Order, exempted all crude oil and petroleum products from the price and allocation regulations. Exec. Order No. 12,287, 3 C.F.R. 124 (1986), *reprinted in* 15 U.S.C. § 757 note (1982). At the time of the Executive Order, DOE had not yet issued entitlements notices for crude oil transactions occurring in December 1980 and the first twenty-seven days of January 1981. The notice for December 1980 was issued in February 1981, 46 Fed. Reg. 14157 (Feb. 26, 1981) and DOE announced that it would thereafter issue the notice for January 1981 transactions. 46 Fed. Reg. 12946 (Feb. 19, 1981). However, from March 1981 through December 1981, a series of federal court injunctions prevented the issuance of the notice for January 1981. During this period, DOE proposed, and thereafter adopted, regulations calling for an additional "clean-up" entitlements notice implementing exception orders relating to the pre-decontrol period. 10 C.F.R. § 211.69 (1986); 46 Fed. Reg. 36092 (July 13, 1981).

Despite its earlier assurances that the 1981 and clean-up entitlements notices would be issued, DOE took no action until October 28, 1983, when it reversed its earlier position and announced its proposed decision to issue no further entitlements notices. 48 Fed. Reg. 50824 (Nov. 3, 1983). This proposal was made final on June 28, 1984. 49 Fed. Reg. 27410 (July 3, 1984).[2]

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[2] The legality of DOE's decision against the issuance of the final entitlements notices was upheld by the Temporary Emergency Court of Appeals in *Texaco, Inc. v. DOE*, 795 F.2d 1021 (Temp. Emer. Ct. App.), *cert. dismissed*, 107 S. Ct. 10 (1986).

DOE's decision against the final entitlements notices eliminated the established regulatory mechanism by which exception relief from the Program had been implemented. During the years following the issuance of the December 1980 notice, refiners continued to receive OHA and FERC orders granting exception relief based on hardship and inequity caused by the Program during its operation. DOE's failure to recognize its legal obligation to implement these post-decontrol regulatory orders gave rise to the relief granted petitioner Southland by the District Court which is the subject of this Petition.

C. FERC's 1984 Order Providing Relief To Southland

Throughout the course of the Entitlements Program, OHA had granted exception relief from the Program to petitioner Southland and other refiners who met the statutory standard of hardship or inequity. This litigation has its origins in two OHA orders issued on February 23, 1981, ("February 23 orders") by which the agency retroactively changed its method of calculating Southland's exception relief for the years 1977 and 1978 and, as a result, required Southland to pay an additional $13.4 million into the Entitlements Program. *Southland Oil Co./VGS Corp.*, 7 DOE ¶ 82,608 (1981); 7 DOE ¶ 82,576 (1981). This amount was paid by Southland through the purchase of entitlements on the December 1980 entitlements notice, issued in late February 1981. By Supplemental Order of April 1, 1981, ("April 1 order") OHA assessed an additional $1,638,068 obligation on Southland to be included on the January 1981 entitlements notice. *Southland Oil Co./VGS Corp.*, 8 DOE ¶ 82,505 (1981).

On May 13, 1981, the United States District Court for the Southern District of Mississippi granted Southland preliminary injunctive relief from the OHA orders. *VGS Corp. (Southland Oil Co.) v. DOE*, No. J81-0170(C),

slip op. (S.D. Miss. May 18, 1981).[3] The Court required entitlements payments to be made to Southland on the January 1981 entitlements notice in the amount of the February 23 orders. The Court's Order further provided that this money would be placed in an interest-bearing escrow account, along with the $1,638,068 that Southland had not yet paid under the April 1 Order, to be repaid to Southland, with interest, to the extent it finally prevailed at FERC in its challenge to the contested OHA orders. However, the objective of the injunction to protect Southland against the loss of interest income during the FERC proceedings was effectively negated by DOE's failure to issue either the January 1981 or clean-up entitlements notices.

On October 18, 1983, a FERC Presiding Officer issued a Proposed Order finding that the February 23 and April 1, 1981 OHA Orders had erroneously imposed on Southland entitlements obligations of $7,597,567. The Proposed Order relieved the company of the $1,638,038 entitlements purchase obligation imposed by the April 1 Order and provided that an additional $5,956,499 in exception relief be implemented on the final entitlements notices. *Southland Oil Co./VGS Corp.*, 25 FERC ¶ 62,118, at 63,259-60 (1983). Although issued ten days prior to DOE's October 28, 1983 announcement of its proposed decision against the publication of the final entitlements notices, the Proposed Order specifically addressed the possibility that DOE would make such a decision. The Presiding Officer ordered Southland's relief to be implemented *regardless of that decision*:

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[3] Pursuant to Rule 21.1(i) of this Court, petitioners advise the Court that the District Court found federal jurisdiction under 28 U.S.C. §§ 1331, 1361, and 2201-02, and under § 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (1982), as incorporated by 5(a)(1) of the EPAA, 15 U.S.C. § 754 (1982).

> In the event no further entitlements notice is issued, DOE will take other appropriate action to implement this order.

Id. at 63,260. On May 8, 1984, just prior to DOE's final decision against the issuance of the final entitlements notices, FERC affirmed its Presiding Officer's Proposed Order, including the above-quoted language.[4] *Southland Oil Co./VGS Corp.*, 27 FERC ¶ 61,205 (1984) (the "1984 FERC Order").

D. DOE's Failure To Implement The 1984 FERC Order

Although the eight-month administrative proceeding on issuance of the final entitlements notices also had addressed the exception relief issue, DOE ended the Program without adopting an alternative means of implementing unpaid exception orders. Instead, on the same day it announced its final decision to terminate the Entitlements Program, DOE commenced yet another "public proceeding" on the exception order question, 49 Fed. Reg. 27410, 27419 (July 3, 1984), thus beginning a second round of comments and testimony on the issue.

On January 9, 1985, after six more months of agency proceedings and deliberation, DOE issued what it called its "final decision" on exception orders. 50 Fed. Reg. 1919 (Jan. 14, 1985). In direct violation of the mandatory language of § 504(a) of the DOE Organization Act as well as the FERC Orders in *Southland* and related cases, DOE determined that exception relief orders ". . . did not create any unconditional rights or obligations in the event no further Entitlements lists were published."

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[4] FERC also had adopted such language in several earlier orders granting exception relief to other refiners. *See, e.g., USA Petroleum Corp.*, 19 FERC ¶ 62,609 (1982), *aff'd*, 23 FERC ¶ 61-016 (1983); *Navajo Refining Corp.*, 21 FERC ¶ 62,521 (1982), *aff'd*, 23 FERC ¶ 61,017 (1983).

Id. at 1923.[5] Nevertheless, the Department recognized that " . . . fairness requires an attempt to use another means of granting relief to firms with adjudicated hardship." *Id.* at 1921. DOE noted that one alternative mechanism to fund exception orders was payment from crude oil refund monies held by DOE, in interest-bearing accounts, as the result of enforcement proceedings against firms charged with violating the price regulations (the "overcharge funds"). *Id.* The Department proposed to implement exception orders in this way, but only if OHA determined, in its separately-pending administrative proceedings conducted in connection with the *Stripper Well* litigation,[6] that refiners had been among those injured by the violations for which the overcharge funds had been collected. *Id.* According to DOE, such a determination would establish the overcharge funds as an appropriate surrogate for the payment of exception relief through the Entitlements Program; indeed, the Department found that "[u]se of this refund money would be entirely consistent with the effects of . . . [exception] orders issued during the period . . . of controls and the operation of the Entitlements Program." *Id.* at 1922.

OHA's *Stripper Well* proceeding did not end until June 21, 1985 when OHA found that refiners did, indeed, suffer injury from overcharge violations of the EPAA. 50 Fed. Reg. 27400, 27401 (July 2, 1985). Thus, the only precondition established by DOE for payment of Southland's relief from the overcharge funds finally had been met. Incredibly, however, DOE still paid not a

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[5] DOE's January 1985 legal conclusion was wholly at odds with the position it had taken at the time it issued its entitlements clean-up regulations in July 1981. At that time, DOE had written: ". . . [W]e cannot purport to cut off claims and obligations merely because outstanding cases are not finally determined by the date of the clean-up list." 46 Fed. Reg. 36092, 36096 (July 13, 1981).

[6] *In re the Department of Energy Stripper Well Exemption Litigation,* M.D.L. No. 378 (Theis, J.).

penny of relief to Southland nor to other refiners with unpaid orders. Instead, the Department manufactured a new excuse for non-payment, this time deciding to withhold payment pending the outcome of the *Texaco, Inc. v. DOE* litigation concerning the legality of DOE's decision against the final entitlements notices. *Id.* at 27403. Thus, the Department, without explanation, reneged on its January 1985 commitment to pay exception orders once refiner class injury was determined.

On July 12, 1985 the District Court issued a declaratory judgment of DOE's "unconditional and non-discretionary obligation" to implement the Southland FERC Order. Appendix at 17a-18a. The Court found "wholly unreasonable and insupportable" DOE's interpretation of the FERC Order as imposing only "conditional" obligations on DOE. Appendix at 18a. The District Court found DOE's position "totally frivolous," and characterized DOE's track record as one of "delay—delay—delay." Appendix at 20a.

Despite this rebuke, DOE continued to withhold Southland's relief in flagrant disregard of its legal duty. On October 2, 1985, the Department announced that it had segregated the overcharge funds sufficient to pay the Southland and other exception orders in separate accounts, but continued to withhold them until completion of the *Texaco* litigation. *Amber Refining Inc.*, 50 Fed. Reg. 41572 (Oct. 11, 1985) ("*Amber Refining* decision"). DOE also announced that it would pay interest on the exception orders, but only from October 2, 1985, a random date tied to its own announcement.

On December 4, 1985, the District Court issued a mandamus order[7] against DOE requiring the payment to

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[7] The *Southland* mandamus order was the fourth such order issued by federal district courts in cases involving DOE's failure to implement adjudicated entitlements exception relief. *See Navajo Refining Co.* v. *DOE*, No. 83-1492-M, slip op. (D.N.M. July 23,

Southland, within 20 days, of the $5,956,499 required by the 1984 FERC Order, with interest on that sum running from the date of that Order, May 8, 1984. Appendix at 26a-27a. The Court's inclusion of an interest factor made Southland whole for the loss of the time-value of its adjudicated regulatory relief during the period of DOE's unlawful failure to implement that relief. This was a loss suffered by no refiner while the Entitlements Program was operating; as noted above, the Program had implemented exception orders automatically on the next monthly entitlements notice. Six days after the District Court's grant of mandamus to Southland, the Temporary Emergency Court of Appeals ("TECA") expressed its own outrage at DOE's failure to honor adjudicated exception relief claims, when it refused to stay a mandamus order in a similar case, declaring that DOE's delay in implementing adjudicated exception orders was ". . . against the principles of good government and proper treatment of its citizens. . . ." Transcript of Proceedings at 45, *Navajo Refining Co. v. DOE*, (Temp. Emer. Ct. App. Dec. 10, 1985) (No. 10-62).

The government did not appeal the District Court's determination that DOE had acted in contravention of its legal authority in failing to implement Southland's relief. It appealed only the award of interest running from May 8, 1984 to October 2, 1985.

E. The Decision Of The Appellate Court

In its opinion in this case, TECA again condemned DOE's conduct toward exception orders recipients in ex-

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1985), *appeal dismissed as moot*, No. 10-62 (Temp. Emer. Ct. App. Mar. 10, 1986); *USA Petroleum Corp. v. DOE*, No. 84-1017, slip op. (D.D.C. Sept. 20, 1985) and *Kern Oil & Refining Co. v. DOE*, No. 85-0961, slip op. (D.D.C. Sept. 20, 1985), *appeals dismissed by stipulation*, Nos. DC-105 and DC-106 (Temp. Emer. Ct. App. Jan. 7, 1986).

traordinarily strong terms. The Court wrote that ". . . sympathy and the equities all favor the plaintiff in this case", finding that "[t]he actions by DOE over the last five years in this and other matters have simply been beyond belief." Appendix at 7a. Nevertheless, the Court, by a 2-0 vote,[8] reversed the District Court's award of interest running from the date of the 1984 FERC Order.

TECA reached this conclusion by its reading of this Court's decisions on the doctrine of sovereign immunity. According to TECA, the District Court's award of interest to Southland is barred by "the sovereign immunity rule that in the absence of a *specific* provision in a contract or statute, or express *consent* by Congress, interest does not run on a claim against the United States." Appendix at 7a (emphasis in original). According to TECA, this Court's decisions "never articulate the rationale underlying the rule, but rather simply apply it in a mechanical fashion." Appendix at 9a. For TECA, two facts alone were sufficient to invoke sovereign immunity. First, TECA found that "[t]he Treasury has the money" from which the interest would be paid, although the Court acknowledged that the overcharge funds were not part of the general fund of the U.S. Treasury but rather were in "a separate interest-bearing account . . . ." Appendix at 9a. Second, TECA found that Southland's claim was "against the United States," even though "the government has never claimed a right to the money" sought by Southland. Appendix at 9a. Finding no express statutory waiver of sovereign immunity, the Court held the interest award barred.

Thus, despite finding DOE guilty of egregious misconduct in its administration of a regulatory program, TECA found the courts powerless to provide a complete remedy for the harm caused by that misconduct.

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[8] Judge Duniway, a member of the original three-judge panel, died without having participated in the decision.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS AN UNJUSTIFIED EXTENSION OF THE SOVEREIGN IMMUNITY DOCTRINE

TECA's self-described "mechanical" application of the general rule against the award of interest on claims against the government caused it to extend that rule to a class of cases to which it heretofore has never been applied. TECA simply failed to consider the distinguishing characteristics of the District Court's award of interest to Southland.

A. The Rule Barring Interest On Claims Against The Government Has Been Limited To Interest Accruing On Funds To Which The Government Has Asserted A Right

The cases in which this Court has invoked sovereign immunity to bar interest awards share a fundamental similarity: the disputed interest had accrued on funds which the federal government had collected for its own benefit and asserted were its own. The two decisions on which TECA primarily relied are illustrative.[9]

United States v. Louisiana, 446 U.S. 253 (1980) involved a dispute between the federal government and the State of Louisiana over ownership of various offshore oil leases. By agreement between the parties, the disputed proceeds from the leases were impounded in the United States Treasury until the resolution of the ownership issue. After Louisiana was awarded some of the

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[9] In addition to the cases discussed below, TECA cited this Court's recent 6-3 decision in *Library of Congress v. Shaw*, 106 S. Ct. 2957 (1986). The central issue in *Shaw*, however, was not whether sovereign immunity was applicable, but rather whether Title VII of the Civil Rights Act of 1964 had waived sovereign immunity so as to permit the recovery of interest on court-awarded attorneys' fees. Petitioners here argue that the issue of waiver does not arise, because sovereign immunity is inapplicable in the first instance.

impounded funds, it asserted a claim for the interest which had accrued on the awarded funds. The Court denied interest, invoking the general immunity of the United States from interest claims absent express provision for interest in a contract or statute. *Id.* at 264. There was, of course, no question that the government had collected the disputed lease proceeds for its own benefit. Thus, Louisiana's interest claim was against the United States because it was a claim for interest on funds which the federal government had asserted were its own.

This is also true of the interest claim in *United States v. N.Y. Rayon Importing Co., (#2)*, 329 U.S. 654 (1947). *N.Y. Rayon* involved a claim for interest on customs duties which had been erroneously imposed. Again, there was no doubt that the disputed duties were funds which the government had collected for its own benefit and had asserted were its own.

The decisions cited in the *Louisiana* and *N.Y. Rayon* opinions also illustrate the point. Each case involved a claim for payment of a debt with government funds. For example, the issue in *Smyth v. United States*, 302 U.S. 329 (1937), was the plaintiff's right to interest on government bonds; in *Albrecht v. United States*, 329 U.S. 599 (1947), it was interest on the purchase price for land bought by the government for its own use; and in *Tillson v. United States*, 100 U.S. 43 (1879), and *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947), it was interest on amounts due under contracts entered into by the government.

In contrast, this Court has found the government's immunity from interest inapplicable in cases brought against the government, but not involving claims of debts owed by the government. These cases arose from claims made by private citizens under the Trading with the Enemy Act, a wartime statute under which the govern-

ment was empowered to seize the property of persons regarded as enemies of the United States, property which was then subject to the claims of other persons with legal rights against such enemies. In *Miller v. Robertson*, 266 U.S. 243 (1924), plaintiff filed suit under the Act against the Alien Property Custodian and the Treasurer of the United States, alleging that certain German citizens whose property had been seized by the United States were in breach of a contract with the plaintiff. This Court affirmed the lower court's grant of interest to the plaintiff on the funds recovered, even though the statute contained no provision for the payment of interest. The Court held the sovereign immunity doctrine inapplicable:

> While the suit . . . is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest . . . does not apply.

Id. at 257. *See also Henkels v. Sutherland*, 271 U.S. 298 (1926) (Court permitted recovery of interest by plaintiff on proceeds from government's sale of plaintiff's securities which had been wrongfully seized under Trading with the Enemy Act). The Court of Appeals for the D.C. Circuit later followed *Miller* in allowing the recovery of interest on a claim made under the Act, rejecting the argument that amendments to the Act since *Miller* had given the United States "something more than a custodial interest in the enemy property held by it so as to characterize Section 34 proceedings not only as suits against a sovereign but also as claims against a sovereign. . . ." *Brownell v. Bank of American Nat. Trust & Savings Ass'n*, 214 F.2d 855, 857 (D.C. Cir.), *cert. denied*, 348 U.S. 864 (1954).

These cases demonstrate TECA's misreading of this Court's sovereign immunity jurisprudence. Contrary to TECA's "mechanical" approach to the issue, this Court's decisions have turned on the nature of the relationship

between the government and the funds or property against which the plaintiff's claim is made. Where the government has acted as a custodian or stakeholder as to the funds or property sovereign immunity has been held not to apply, regardless of whether government agencies were named defendants or whether the funds or property were held in the United States Treasury. As will become evident, this case is a classic instance of a claim on funds on which the government itself has never asserted an interest beyond that of a custodian for the benefit of those with rightful claims on the funds.

B. The Doctrine Of Sovereign Immunity Should Not Be Extended To Bar Interest On Regulatory Relief To Be Paid From Funds Held By The Government Only For The Benefit Of Others

This case involves no claim on funds which the government has asserted are its own. Rather, it involves a claim for relief from a regulatory program using funds which the government concedes are not public funds, but rather were collected for the benefit of the rightful claimants under the regulatory program.

The overcharge funds from which Southland's interest would be paid are held by DOE pursuant to its authority under § 209 of the Economic Stabilization Act, 12 U.S.C. § 1904 note (1982), as incorporated in the EPAA, 15 U.S.C. § 754(a) (1982), to effect "restitution" of funds received in violation of the price regulation. DOE itself has acknowledged that it has "no pecuniary interest" in the overcharge funds, *Coline Gas Corp.*, 9 DOE ¶ 82,508, at 85,052 (1981) and TECA has declared that DOE has a "*duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 723 (Temp. Emer. Ct. App.), *cert. denied*, 459 U.S. 877 (1982) (emphasis in original). TECA's inclusion of the phrase "with interest" in its *Citronelle* holding is itself starkly inconsistent with the idea that the payment

of interest from the overcharge funds raises the sovereign immunity issue. DOE functioned simply to collect funds from regulatory violators and restore them to the victims of the violations, with interest. That the government itself asserted no proprietary claim on the funds was made unequivocally clear by DOE in its Supplemental Order in *Placid Refining Co.*, 14 DOE ¶ 85,111 (1986), when it wrote:

> . . . [T]he crude oil overcharge moneys involved in this proceeding *are not public funds*, but are funds obtained from private parties and *held by the DOE for distribution to injured parties* pursuant to its restitutionary authority under applicable statutes.

Id. at 88,199, n.1 (emphasis added). Thus, Southland's claim for regulatory relief to be paid from the overcharge funds, and interest thereon, is a claim on funds which the government has collected, and maintains, subject to the claims of others on the funds. As in the cases decided under the Trading with the Enemy Act, sovereign immunity does not apply.[10]

It is true, as TECA indicated, that in *N.Y. Rayon* interest was held barred by sovereign immunity even for the period following the final determination that the customs duties had been wrongfully collected and the government had no claim on them. The *N.Y. Rayon* case nevertheless is distinguishable from the present case because in *Rayon* the government had originally claimed a right to the customs duties; the government has never

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[10] That the District Court's award of interest to Southland involved no diversion of public funds should be contrasted with the cases in which this Court has applied sovereign immunity because the plaintiff had made a claim on public funds. In *Dugan v. Rank*, 372 U.S. 609, 621 (1963), the Court made a specific finding that the judgment would " 'expend itself on the public treasury . . .' ", (citing *Land v. Dollar*, 330 U.S. 731, 738 (1947)). In *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963), the Court relied on the fact that the order requested would "cause . . . the disposition of property admittedly belonging to the United States."

claimed an interest in the overcharge funds apart from its restitutionary obligations. *N.Y. Rayon* is also distinguishable because the interest denied the plaintiff in that case presumably accrued to the benefit of the government; in contrast, the interest denied Southland accrued to the benefit of the other claimants on whose behalf the government collected and maintains the overcharge funds. Moreover, if *N.Y. Rayon* is to be read broadly to bar interest claims on funds held for the benefit of others, then the decision must be regarded as directly contrary to *Miller v. Robertson*, a conflict which this Court should resolve.

TECA's decision also suggests that the application of sovereign immunity should not turn on the characteristics of the overcharge funds because DOE could have chosen a different method to pay exception orders in the absence of the final entitlements notices. Appendix at 10a. TECA overlooked the fact that the choice of the overcharge funds was necessitated by the need for a regulatory surrogate for the Entitlements Program which would impose the costs of regulatory relief on the same parties who bore them during the operation of the Program. *See* discussion *supra*, p. 8. The use of government funds to pay exception orders would not have been appropriate because such funds were never used in the operation of the Entitlements Program. The government's relationship to the overcharge funds was the same as its relationship to the cash transfers under the Entitlements Program; it effected transfers of funds between private parties, but never made a claim on the funds for itself. Thus, just as the payment of interest on cash transfers made under the Entitlements Program would not have raised the barrier of sovereign immunity,[11] neither should

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[11] In point of fact, the issue whether refiners should be paid interest on exception relief unlawfully delayed never arose during the Entitlements Program because the Program functioned to effectuate adjudicated exception orders on the next monthly entitlements notice.

the payment of interest on entitlements claims from the overcharge funds. This was implicitly conceded by DOE itself when it decided, in its *Amber Refining* decision, to use the overcharge funds to pay refiners interest on unpaid exception orders from the arbitrarily chosen date of October 2, 1985. *Amber Refining Inc.*, 50 Fed. Reg. at 41575.

TECA's decision has important implications for any situation in which the government acts as a custodian, stakeholder or trustee with respect to funds or property. As the Trading with the Enemy Act cases suggest, the EPAA price control program was not the first instance of this governmental function, nor will it be the last.[12]

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE ABOLITION OF THE SOVEREIGN IMMUNITY DEFENSE IN THE 1976 AMENDMENT TO SECTION 702 OF THE ADMINISTRATIVE PROCEDURE ACT

TECA's reversal of the District Court's interest award is directly contrary to the language and intent of the 1976 amendment to § 702 of the Administrative Procedure Act ("APA"). Pub. L. No. 94-574, § 1, 90 Stat. 2721 (1976). The relevant provision reads:

> An action in a court of the United States seeking relief other than money damages and stating a claim

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[12] A recent example of this function is provided by the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985). This statute allows states which already have radioactive waste disposal facilities to impose surcharges on other states for the use of the existing facilities. A portion of the surcharge money is to be transferred to an escrow account held by the Secretary of Energy. The statute makes the Secretary trustee for the funds, which "shall not be the property of the United States." 42 U.S.C.A. § 2021e(d)(2)(A) (West Supp. 1986). These monies are then to be refunded to states according to their progress in developing their own facilities. The statute is silent on the payment of interest on these refunds.

> that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief thereon be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1982). As Professor Davis has written of this provision: "Sovereign immunity in suits for relief other than money damages is no longer a defense. The United States is liable in such suits as if it were a private party." 4 K. Davis, *Administrative Law Treatise* § 23:19, at 192 (2d ed. 1983).

DOE itself has conceded that Southland's action to enforce its FERC order was not a claim for "damages," but rather for "regulatory relief." Brief of Defendants-Appellants, at 23, *VGS Corp. v. DOE*, (Temp. Emer. Ct. App., filed Jan. 31, 1986) (No. 5-119). Likewise, the District Court's award of interest dating from May 8, 1984 was not an award of money damages, but was rather a command by the Court, issued as part of a mandamus order, requiring DOE to supplement the regulatory relief ordered by FERC to compensate Southland for DOE's unlawful delay in implementing the 1984 FERC order. As noted earlier, DOE itself had decided to pay interest on unpaid regulatory relief, but only running from October 2, 1985, an arbitrary date with no restitutionary justification whatever. Put simply, the District Court exercised its equitable authority to order DOE to provide greater regulatory relief than DOE had been willing to provide.

The legislative intent of the 1976 amendment was to permit courts to do precisely what the District Court did in this case: to use their equitable powers to provide relief for wrongs committed by the government. In reporting the bill favorably, the House Judiciary Committee wrote:

> Congress has made great strides toward establishing monetary liability on the part of the Govern-

> ment for wrongs committed against its citizens by passing the Tucker Act of 1875, 28 U.S.C. sections 1346, 1491, and the Federal Tort Claims Act of 1946, 28 U.S.C. section 1346(b). S.800 would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages such as an injunction, declaratory judgment, or writ of mandamus.

H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6121 ("House Committee Report"). The Committee found that "the time now [has] come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *Id.* at 9.

Although Southland vigorously asserted to TECA that the 1976 amendments to the APA made the sovereign immunity defense unavailable to DOE,[13] the decision below fails to address this argument. The consequence of the Court's silence is not simply the failure to compensate Southland for the injury caused by DOE's misconduct. Thirteen other refiners were similarly situated with adjudicated claims of regulatory relief aggregating approximately $69 million[14] which went unpaid by DOE until the federal courts intervened. According to DOE's own figures,[15] these refiners lost an aggregate of $100 million in interest during the period when their adjudicated regulatory relief went unpaid. The use of the shield of sovereign immunity to preclude a remedy for injury of this magnitude from governmental wrongdo-

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[13] Brief of Plaintiffs-Appellees Southland Oil Company and Globe Asphalt Co., Inc. at 22-23, *VGS Corp. v. DOE* (Temp. Emer. Ct. App., filed Feb. 25, 1986) (No. 5-119).

[14] *Amber Refining Inc.*, 50 Fed. Reg. at 41579 (Oct. 11, 1985).

[15] Reply Brief of Defendants-Appellants at 4, *VGS Corp. v. DOE*, (Temp. Emer. Ct. App., filed March 11, 1986) (No. 5-119).

ing is precisely the kind of result which the 1976 APA amendment was designed to avoid.[16]

Finally, TECA's use of the sovereign immunity doctrine to preclude equitable relief to Southland is contrary to the broad interpretation of the 1976 amendment given by other federal circuit courts. For example, the Ninth Circuit recently adopted Professor Davis' view that:

> "[A]bolition of sovereign immunity in § 702 is not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages. . . .'"

Assiniboine and Sioux Tribes v. Board of Oil and Gas, 792 F.2d 782, 793 (9th Cir. 1986) (quoting 4 K. Davis, *Administrative Law Treatise* § 23:19, at 195 (2d ed. 1983)).[17] This Court, however, has never addressed the scope of the amendment. It should do so in this case, where the injury from agency misconduct was so great and the violation of Congressional intent by the Court below so patent.

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[16] DOE made two arguments to the appellate court concerning the 1976 amendment. First, it asserted, without explanation, that the decision in *United States v. Louisiana*, 446 U.S. 253 (1980) demonstrated the irrelevance of that statute, even though the opinion in *Louisiana* never mentioned the statute. Second, it mischaracterized the relevant provision as a "judicial review provision" not applicable to DOE. As the legislative history makes clear, the 1976 statute does not provide for judicial review, but rather functions to "remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action *otherwise subject to judicial review*." House Committee Report, at 1 (emphasis added). *See Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982).

[17] *See also Jaffee v. United States*, 592 F.2d 712, 718 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 724-25 (2d Cir. 1983); *Warin v. Dept. of Treasury*, 672 F.2d 590, 591 (6th Cir. 1982); *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d at 1139.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January 8, 1987

APPENDIX

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-119

VGS CORPORATION d/b/a SOUTHLAND OIL COMPANY and
GLOBE ASPHALT CO., INC.,
PLAINTIFFS-APPELLEES,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
for the Southern District of Mississippi

(Civil Action No. J81-0170)

(Argued June 4, 1986 Decided November 28, 1986
Judgment Entered: December 9, 1986)

DENNIS A. HENIGAN, Foley & Lardner, Washington, D.C., with whom Edwin Jason Dryer and Jack L. Lahr of the same firm, Alex A. Alston, Jr., Thomas, Price, Alston, Jones & Davis, Jackson, Mississippi, were on the brief for Plaintiffs-Appellees.

SAMUEL SOOPPER, Attorney, Office of the General Counsel, United States Department of Energy, Washington, D.C., with whom Catherine C. Cook and Dennis M. Moore, Attorneys, were on the brief for Defendants-Appellants.

Jerry E. Rothrock and Harry R. Silver, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., for *Amicus Curiae* Beacon Oil Company.

Sheldon Oliensis, Myron Kirschbaum, Robert B. Bernstein, Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., A. J. Losee, Losee & Carson, Artesia, New Mexico; Henry L. Stern, Holly Corporation, Dallas, Texas, and Thomas W. Houghton, Mayor, Day & Caldwell,

Houston, Texas, Of Counsel, for *Amicus Curiae* Navajo Refining Company.

Before METZNER, DUNIWAY * and WEIGEL, Judges.

METZNER, Judge

The Department of Energy (DOE) appeals from that part of a mandamus order entered in the United States District Court for the Southern District of Mississippi which directed DOE to pay prejudgment interest from May 8, 1984, to the appellee VGS Corporation, d/b/a Southland Oil Company (Southland). DOE complied with the order for the period October 2, 1985 to December 20, 1985, when it paid Southland the principal amount due. The subject of this appeal is the liability of DOE to pay prejudgment interest for the period from May 8, 1984 to October 2, 1985.

The Department of Energy Organization Act authorizes exception relief from the Petroleum Price and Allocation Regulations, including the entitlements program,[1] for those parties adversely affected by the operation of these regulations. 42 U.S.C. § 7194. Exception relief was awarded on a case by case basis to alleviate serious hardship or gross inequity attributable to the impact of the DOE regulations on a refinery. 10 C.F.R part 205, subpart D. This relief, awarded prospectively by the Office of Hearings and Appeals (OHA), excused refiners from certain future entitlements obligations for a specified period. Since this relief was based on a projection of a firm's future performance, it was subject to a subsequent review of actual data at the end of the year.

After OHA conducted its review at the end of a refiner's fiscal year, it would issue a final order regarding

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* Judge Duniway died without having participated in the decision in this matter.

[1] *Cities Service Co. v. Federal Energy Administration*, 529 F.2d 1016 (TECA 1975), *cert. denied*, 426 U.S. 947 (1976).

the relief that the firm was entitled to for the year. If the review determined that the firm was entitled to more exception relief than it had received during the fiscal year an order was issued directing that the refinery be allowed to sell an appropriate number of entitlements on the next entitlements notice. Conversely, if less exception relief should have been granted during the year, the firm was required to purchase additional entitlements on the next entitlements notice.

The details of the entitlements program have been thoroughly delineated in earlier opinions of this court and need not now be repeated. *See, Husky Oil Co. v. Department of Energy*, 582 F.2d 644 (Temp. Emer. Ct. App. 1978); *Cities Service Co. v. Federal Energy Administration*, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976); *Pasco, Inc. v. Federal Energy Administration*, 525 F.2d 1391 (Temp. Emer. Ct. App. 1975).

On February 23, 1981, OHA had issued two orders which changed the method of computing Southland's exception relief for the years 1977 and 1978. As a result Southland was found to have received excessive prospective exception relief and was required to purchase an additional $13.4 million in entitlements on the next monthly notice. This obligation was included in the December 1980 entitlements notice which was issued in February 1981, after President Reagan had ended the price control program. Southland made the additional entitlements purchases. On April 1, 1981, OHA modified the original orders to assess an additional purchase obligation of $1,638,068. This obligation was to be reflected on the next entitlements notice which would have been for January 1981, the last month before decontrol. Although this notice would customarily have been issued by the end of March, it had not been issued by the date of the OHA order.

Southland brought suit in federal court seeking declaratory and injunctive relief from these three orders. The district court issued a preliminary injunction in favor of Southland on May 13, 1981. This injunction required that the January 1981 entitlements notice, which had not as yet been issued, should include entitlements sales on Southland's behalf equal to the sum Southland had paid for entitlements under the OHA orders of February 23, 1981. The injunction further required that when Southland received this money, it should be placed in an interest-bearing escrow account along with the $1,638,068 that Southland had not yet paid under the April 1, 1981 order. The fund was to be used to repay Southland to the extent it prevailed before the Federal Energy Regulatory Commission (FERC) where Southland was administratively challenging the contested OHA orders.

In July 1981 DOE published a regulation establishing a clean-up entitlements notice. In August it then sought to dissolve the preliminary injunction because of the existence of the July regulation. It stated to the court:

> "Southland alleged here that it would suffer injury because there was no mechanism in place that would assure that Southland would receive its money when and if it prevailed in its application for exception relief. That mechanism is now firmly in place . . . ."

The court denied the motion to lift the injunction.

Nothing further happened in this matter until July 6, 1982, when DOE announced that it was seeking public comments as to whether it should publish the January entitlements notice. 47 Fed. Reg. 30,279 (July 13, 1982). If these notices were not published, the district court's preliminary injunction could not be implemented.

On October 18, 1983, a FERC presiding officer issued a proposed order finding that the disputed OHA orders of February 23, 1981 and April 1, 1981 improperly calcu-

lated Southland's exception relief. *Southland Oil Co./VGS Corp.*, 25 FERC ¶ 62,118. The proposed order sought to make Southland whole by relieving it of the remaining purchase obligation of $1,638,068 under the April 1 order, and by providing that an additional $5,956,038 be transferred to Southland in the form of entitlements payments on the next entitlements notice. The January 1981 notice had still not been issued. On May 8, 1984, FERC adopted this proposed order as a final order. *Southland Oil Co./VGS Corp.*, 27 FERC ¶ 61,205.

On June 28, 1984, DOE decided not to issue further entitlements notices. At that time, however, it stated that it would initiate a public proceeding to consider how to implement outstanding exception relief. On January 9, 1985, DOE decided that it would use crude oil overcharge funds held by DOE in the *Stripper Well*[2] litigation to pay holders of exception relief, but only if OHA found that refiners were injured as a class by violations of energy price regulations. OHA so found on June 21, 1985. 50 Fed. Reg. 27,400, 27,401 (July 2, 1985). DOE also stated that payments would be withheld because of the continuing litigation in *Texaco v. Department of Energy*, and that "any payment pursuant to this order will be placed in an interest-bearing escrow account pending the outcome of that litigation." *Id.*

On July 12, 1985, the scene moves back to the district court which at that time issued a declaratory judgment that DOE had an "unconditional and non-discretionary obligation" to pay Southland. The court found DOE's position regarding method and timing of payment to be "totally frivolous," and its record to be one of "delay-delay-delay."

DOE honored this order on October 2, 1985, to the extent of segregating funds in the *Stripper Well* account

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[2] *In re The Department of Energy Stripper Well Exemption Litigation*, M.D.L. No. 378 (Theis, J.).

necessary to pay exception orders. It established separate interest-bearing accounts in the United States Treasury for each claimant to be released upon the completion of the *Texaco* litigation. *Amber Refining Inc., et al.*, 50 Fed. Reg. 41,572 (October 11, 1985). DOE announced that interest on the exception orders would start to run from October 2, 1985.

On December 4, 1985, the district court ordered full restitution to Southland within 20 days. In addition, DOE was directed to pay interest on the amount due from May 8, 1984, the date of the FERC order. The basis for this direction was twofold: (1) Southland's recovery was liquidated at that time, and (2) DOE's objection to honoring the FERC order was frivolous. An order directing payment of exception relief had been entered in *Navajo Refining Co. v. Department of Energy* in September 1985, and a request for a stay in that case was argued before this court on December 10, 1985. The stay was denied at the conclusion of oral argument. Judge Daugherty stated at the time that "the public interest is fundamentally against the delay imposed by D.O.E. in this case, and . . . against the principles of good government and proper treatment of its citizens, including its corporate citizens . . . ." *Navajo Refining Co. v. Department of Energy*, TECA No. 10-62. Transcript of Proceedings, December 10, 1985, at 45.

On December 20, 1985, DOE paid Southland the exception relief awarded by FERC, but included interest only from October 2, 1985. It appealed that part of the court's order requiring it to pay interest from May 8, 1984, the date of the FERC order, to October 2, 1985.

Discussion

This case involves two separate and distinct issues. First, DOE contends that under the doctrine of sovereign immunity it is entirely immune from any claim of prejudgment interest. Second, it contends that even if it is

not immune, the district court abused its discretion in awarding interest in this case. Since the doctrine of sovereign immunity precludes an award of prejudgment interest against DOE, it is unnecessary to reach the question as to whether the district court abused its discretion which would call for a reversal of the judgment.

At the outset I want to state that symypathy and the equities all favor the plaintiff in this case. The actions by DOE over the last five years in this and other matters have simply been beyond belief. This court and several district courts have made this point clear. However, these considerations are not helpful to the plaintiff in this case.

The Supreme Court has frequently reaffirmed over the past several decades the sovereign immunity rule that in the absence of a *specific* provision in a contract or statute, or express *consent* by Congress, interest does not run on a claim against the United States. As will become evident in the ensuing discussion, "claim against the United States" has been broadly construed and has not been limited to the public fisc.

The stringency of the rule is clearly apparent in the Court's most recent discussion of the rule in *Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986). In that case the Court was concerned with a judgment awarding an employee back pay rights with interest against the government under the civil rights acts. Title VII provides that the United States would be liable "the same as a private person." The wording was held not to have been express enough to award interest against the government. The Court took pains to emphasize that "policy, no matter how compelling, is insufficient, standing alone, to waive this immunity." *Id.* at 2965.

In *United States v. Louisiana*, 446 U.S. 253 (1980), the parties had agreed that payments made to the United States on leases of offshore oil land were to be impounded

in a separate fund in the United States Treasury pending determination of the ownership of the land. Although the moneys were commingled with the general funds of the Treasury, a separate account had been established on the books of the Treasury. "This was much more than a recordkeeping device. The receipts were never treated as governmental revenues." *Id.* at 264. The Court held, under the long-expressed doctrine noted above, that the United States has fulfilled its obligation under the agreement, and "that there is no liability on the part of the United States for interest or for the use of the funds; and that the United States has no further obligation for payment beyond those it has performed." *Id.* at 266.

In *United States v. N. Y. Rayon Importing Co., Inc. (#2)*, 329 U.S. 654 (1947), custom duties had been paid erroneously by two corporations. Protests were filed and the Customs Court sustained the protests. The amount of refund was ascertained by the court and checks were issued to the corporations. Because the corporations had been dissolved in the interim, the checks were transmitted to the General Accounting Office where they were deposited in a trust fund in the Treasury. While the funds were commingled with other moneys, their existence in a trust fund was established by bookkeeping entries. The court below had awarded interest for the period after the issuance of the checks. Although the Court was construing a different provision than the one at issue in this case, it pointed out that the section merely "codifies the traditional rule regarding the immunity of the United States from liability for interest on unpaid accounts or claims." *Id.* at 658. The Court said at 663:

> "Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy. We reiterate that only express language in a statute or contract can justify the imposition of such interest."

It is significant that the Court has never considered the nature of the account to be in any way important. It makes no difference whether the money has been set up as a "separate trust fund" or a "separate account" or, as in this case as a separate interest-bearing account in the United States Treasury. Nor has the existence of strong equities, as in the *N.Y. Rayon* case, had an impact on the Court's views. The cases never articulate the rationale underlying the rule, but rather simply apply it in a mechanical fashion. The Treasury has the money and the claim is against the United States to recover that money. This is sufficient to bring sovereign immunity into play.

It is argued that sovereign immunity does not apply in this case because the government has never claimed a right to the money. While this might distinguish *Louisiana, supra*, it certainly does not remove the obstacle presented by the *N.Y. Rayon* case. In that case, while it is true that the government at one point claimed it had a right to the money, it was finally determined that the money belonged to the corporations. After the checks were issued, the government had no claim to these funds. The government was merely holding the money until the rightful owner appeared. Nevertheless, the Supreme Court denied the availability of interest to the claimants under the doctrine of sovereign immunity.

Relief in this action was predicated on Section 504(a) of the Department of Energy Organization Act, 42 U.S.C. § 719(a). There is no provision for the payment of interest in that Act. While Section 209 of the Economic Stabilization Act, 12 U.S.C. § 1904, has been interpreted to permit an award of interest against a private party, *United States v. Exxon Corp.*, 773 F.2d 1240, 1278-79 (Temp. Emer. Ct. App. 1985), such interest may not be awarded against the government. At any rate, provision for the payment of interest must be express in the statute under consideration. In *Library of Congress v. Shaw*,

supra at 2961, the Court said: "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Similar language is found in the *N.Y. Rayon* case, *supra* at 659:

> "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed."

The judgment entered by the court below flowed from its finding on July 12, 1985, that DOE had an "unconditional and non-discretionary obligation" to pay to the plaintiff. This obligation had nothing to do with the overcharge fund. The importance of the fund is simply that DOE chose to pay its liability out of that fund if *Texaco, supra,* was reversed, which it was. The choice by DOE of how it would pay the judgment has no bearing on whether sovereign immunity applies to the judgment itself. If the overcharge fund did not exist, DOE would have had to pay the judgment some other way.

The part of the order appealed from is reversed, and the provision for payment of interest from May 8, 1984 to October 2, 1985 is vacated.

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
JACKSON DIVISION

Civ. A. No. J81-0170(B)

VGS CORPORATION d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF ENERGY
and JOHN S. HERRINGTON, AS SECRETARY OF ENERGY,
Defendants.

July 12, 1985

As Amended Aug. 20, 1985

MEMORANDUM OPINION AND ORDER

BARBOUR, District Judge.

The Court has before it the following Motions:

(1) Motion of Plaintiffs, VGS Corporation, d/b/a Southland Oil Company and Globe Asphalt Co., Inc. (hereinafter collectively referred to as "Southland") for Partial Summary Judgment; (2) Motion of Defendant, United States Department of Energy ("DOE") to Dismiss; and (3) Motion of DOE to stay.

1. *Motion of Southland for Partial Summary Judgment and Motion of DOE to Dismiss*

Southland seeks a declaratory judgment that the DOE has an unconditional and non-discretionary obligation to

implement an order issued by the Federal Energy Regulatory Commission (FERC) on May 8, 1984, requiring DOE to restore to Southland $5,956,499.00 which DOE wrongfully required Southland to pay under the Crude Oil Entitlements Program. According to Southland the DOE has not only failed to implement the FERC Order, but has also unilaterally imposed additional conditions to obtaining relief by virtue of its January 9, 1985, decision which provides that the Office of Hearing and Appeals ("OHA") will implement the relief if the OHA determines that refiners as a class were injured by violations of the Emergency Petroleum Allocation Act ("EPAA").

After oral argument before the Court, on the parties' Motions, DOE notified the Court that the OHA announced on June 21, 1985, that an appropriate portion of crude oil overcharge funds will be used to fund outstanding, finally adjudicated "receive orders" such as that held by Southland and that an appropriate procedure would be implemented to provide the relief. However, because of litigation concerning the termination of the entitlements program, *e.g.*, *Texaco, Inc. v. DOE*, TECA Nos. 3-44 through 3-49, payment of the "receive orders" will be placed in an interest-bearing escrow account pending the outcome of *Texaco*.

[1] DOE asserts that the OHA decision renders the instant litigation moot. Southland argues that the OHA decision of June 21, 1985, places yet another condition on the May 8, 1984, unconditional FERC order. Southland notes that the *Texaco* litigation is now in the briefing stage before the Temporary Emergency Appeals Court and that the United States Supreme Court may yet have to ultimately determine whether the entitlements lists will be published. Then, Southland comments that other pending litigation will have to decide the accuracy of the entitlements lists. Since the June 21, 1985, OHA ruling does not satisfy the Southland claim, this Court concludes that the June 21, 1985, OHA order does not moot the South-

land claim. Accordingly, this Court will consider the merits of the pending Motions before it.

In November 1973, Congress enacted the EPAA which created comprehensive allocation and pricing regulations for crude oil and petroleum products. 15 U.S.C. § 753(a). Pursuant to the Act, the Federal Energy Administration ("FEA"), the predecessor to DOE, established a multi-tiered system of crude oil price controls. 10 C.F.R. Part 212, Sub-Part D (1984). Under the system, certain domestic crude oil was subject to "old" or "lower tier" ceiling prices while other domestic crude oil was subject to higher "new" or "upper tier" ceiling prices. Other categories of crude oil were exempt from price control.

The system placed those refiners forced to buy upper-tier or uncontrolled crude oil at a competitive disadvantage. To address this problem, FEA promulgated the Entitlements Program. 10 C.F.R. § 211.67 (1984); 39 Fed.Reg. 42246 (Dec. 4, 1974). The regulations roughly equalized the cost per barrel of crude oil among refiners through cash transfers between refiners rather than the physical transfer of oil. To achieve this result, each month refiners with greater than average access to price-controlled domestic crude oil bought "entitlements" from refiners with less than average access to low cost crude. 10 C.F.R. §§ 211.67(a)(1), (b)(1) and (c) (1984). The "entitlements" purchased or sold each month by refiners were published in a monthly entitlements notice to the refining industry. 10 C.F.R. § 211.67(i)(1) (1984). If the obligation to purchase entitlements would impair the refiner's "historically established financial position," then the refiner was entitled to "an adjustment" or "exception" to "prevent special hardship, inequity or unfair distribution of burdens. . . ." 42 U.S.C. § 7194(a).

The exceptions process functioned by OHA grants of prospective relief for six month periods based upon the financial projections of the refiner, to be followed by a

year-end review based on actual figures to determine whether the refiner had received inadequate or excessive exception relief. To implement the year-end findings, OHA issued orders permitting the refiner to sell or requiring it to buy additional entitlements. *Beacon Oil Company*, 3 FEA ¶ 83,209 (June 8, 1976). These buy or sell obligations were then reflected on subsequent entitlement notices.

In October 1983, the Presiding Officer of FERC ruled that Southland had unlawfully been required to pay $7,597,567.00 to the Entitlements Program for the years 1977 and 1978. FERC sought to restore this sum to Southland by relieving it of a purchase obligation imposed by an April 1, 1981, OHA order and by providing that:

> . . . the Economic Regulatory Administration of the Department of Energy shall in the next Entitlements Notice increase the value of entitlements [Southland] would otherwise be permitted to sell (or decrease the value of the entitlements it would otherwise be entitled to purchase) by $5,956,499.00 to the nearest entitlement. In the event no further Entitlements Notice is issued, DOE will take other appropriate action to implement this action.

On May 8, 1984, FERC issued an Order adopting the October 1983 Order of the Presiding Officer. The May 8, 1984 FERC Order is the order which Southland seeks to implement.

Prior to issuance of the FERC Order, President Reagan, on January 30, 1981, issued Executive Order 12287, exempting all crude oil and petroleum products from the price and allocation regulations (the "Decontrol Order"). The Decontrol Order authorized the Secretary of Energy "to take such actions as he deems necessary to implement [the] Order, including the promulgation of Entitlements Notices for periods prior to [the] Order and the establishment of a mechanism for entitlements adjustments for periods prior to [the] Order."

Shortly, after the Decontrol Order, DOE published official assurances that it "will publish" a December 1980 Entitlements Notice in February 1981 and that it "will also publish" a Notice in March reflecting transactions in the first 27 days of January, 1981. Ruling 1981-1, 46 Fed.Reg. 12946 (Feb. 19, 1981) (Answer #2). The December notice was issued February 20, 1981. 46 Fed. Reg. 14157 (Feb. 26, 1981).

Between March 1981 and December 1981, a series of Federal Court injunctions prevented the issuance of the January 1981 Entitlements Notice. *See, e.g., Mobil Oil Corporation v. DOE*, 520 F.Supp. 420 (N.D.N.Y.), *rev'd*, 659 F.2d 150 (Temp.Emer.Ct.App.), *cert. denied*, 454 U.S. 1110, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981); *Indiana Farm Bureau Cooperative Association v. DOE*, [1981-84, Transfer Binder] Energy Mgmt. (CCH) ¶ 26,315 (S.D.Ind.1981); *Winston Refining Company v. DOE*, [1981-84 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,311 (M.D.N.C.1981). During this period, however, the Economic Regulatory Administration ("ERA") of the DOE conducted a rule-making proceeding "to provide for the orderly termination of the Crude Oil Entitlements Program." *See* 46 Fed.Reg. 15112 (March 3, 1981). ERA adopted regulations which contemplated issuance of a final "Clean-Up Notice" implementing adjustments relating to the period prior to decontrol, specifically including entitlements exceptions order. 10 C.F.R. § 211.64 (1984); 46 Fed.Reg. 36092 (July 13, 1981).

In 1981, when DOE established the Clean-Up Notice to liquidate entitlements rights and obligations, it noted its duty to implement all OHA exception decisions even after decontrol;

> It is the DOE's position that OHA may award entitlements exception relief after January 28, 1981, if the relief awarded relates to periods prior to decontrol. If OHA decides that a firm should have had

> exception relief at the time of decontrol, it is DOE's position that the intervention of decontrol did not negate the prior claim to exception relief and that DOE must give effect to such relief.

46 Fed.Reg. at 36093. With regard to claims finally adjudicated after issuance of the Clean-Up Notice, DOE stated:

> We have considered and rejected the notion of ignoring post-clean-up claims and obligations adjudicated by FERC or the courts. First, courts have made clear that agencies cannot extinguish rights *sub judice*, so we cannot purport to cut off claims and obligations merely because outstanding cases are not finally determined by the date of the clean-up list.

46 Fed. Reg. at 36096.

Despite these affirmations by the DOE of its obligations with regard to exception relief, in November 1983, the DOE announced its tentative decision to issue no further entitlements notices and questioned whether outstanding OHA, FERC and court decisions should be implemented notwithstanding non-publication of the January entitlement adjustment notices. 48 Fed.Reg. at 50482. Thereafter, on June 28, 1984, DOE announced its final decision to issue neither the January 1981 nor the Clean-Up Entitlements Notices. 49 Fed.Reg. 27410 (July 3, 1984). Simultaneously, the DOE announced a "tentative decision" to effectuate orders which provide for receipt of money by firms only "if an appropriate mechanism can be devised which does not unduly disrupt the market." 49 Fed.Reg. at 27148. DOE also announced its tentative decision not to enforce OHA and FERC orders requiring the repayment of excessive exception relief received by certain firms during the course of the entitlements program. *Id.* On January 9, 1985, DOE announced its "final decision" on exception orders, making final its "tentative decision" not to enforce such orders.

50 Fed.Reg. 1919 (January 14, 1985). Thus, refiners who, during the course of the Entitlements Program, were granted exception relief in excess of that warranted under the regulatory standards were excused from their obligation to repay the relief erroneously granted. Likewise, DOE also concluded that it had no legal obligation to give effect to exception orders providing for the payment of exception relief wrongfully denied during the operation of the program. 50 Fed.Reg. at 1923. DOE noted, however, that OHA was conducting proceedings to determine proper disposition of refund monies collected in cases involving violations of the crude oil pricing regulations. 50 Fed.Reg. at 1921. According to DOE, unpaid exception orders would be paid if OHA determines refiners as a class were injured by violations or alleged violations of the EPAA regulations. *Id.* As indicated above, the OHA determined on June 21, 1985, that refiners as a class had been injured and were entitled to an appropriate portion of the Crude Oil Overcharge Fund.

[2] DOE opposes the Motion of Southland for Partial Summary Judgment and moves to dismiss the complaint on the basis that the Decontrol Order rendered the May 8, 1984, FERC order discretionary since the FERC order presupposed the continued operation of the Entitlements Program and the publication of the Entitlements lists. DOE argues that the FERC order and the Decontrol Order left it to the discretion of DOE to determine what relief is appropriate in the event an entitlement list was not published. DOE also states that the implementation of the FERC order is conditional since it depends on whether OHA determines that refiners as a class were injured by violations of the EPAA. Now DOE contends that payment or receive orders must await the outcome in *Texaco*.

This Court finds that Southland is entitled to a declaratory judgment that the DOE has an unconditional and non-discretionary obligation to implement the May 8,

1984, FERC order, requiring DOE to restore to Southland $5,956,499.00. The Court further finds that the Motion of DOE to Dismiss or for Summary Judgment is denied as being frivolous. *See Texaco, Inc. v. DOE*, Civil Action No. 84-391-JLL (D.Del. March 20, 1985); *USA Petroleum v. DOE*, Civil Action No. 84-1017 (D.C. D.C. February 15, 1985); *Navaho Refining Company v. DOE*, [1981-84 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,484 (D.N.M. 1984), *Appeal dismissed*, [1981-84 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,514 (Temp. Emer.Ct.App.1984). The decisions in *USA Petroleum* and *Navaho Refining Company* clearly mandate the implementation of the Southland exception order. DOE cannot now refuse to recognize the Southland exception order based upon its wholly unreasonable and insupportable interpretations of the FERC order and the Decontrol Order. Indeed, by virtue of the OHA order of June 21, 1985, DOE obviously recognizes that the Southland-type claims are entitled to relief despite its earlier contrary contentions.

In *Texaco, Inc. v. DOE*, Texaco sued to compel DOE to publish the entitlements list under the Entitlements Program, which DOE claimed it was relieved from doing by virtue of the Decontrol Order. The court held that the power of the DOE to amend the entitlements regulations ended after the Decontrol Order, and that the DOE could not now recoup that power by refusing to comply with the regulations. Further, the court stated that the regulations impose an obligation on DOE to issue entitlements for crude oil transactions occurring prior to the Decontrol Order.

[3] Based upon *Texaco, Inc. v. DOE*, this Court finds that DOE cannot attach other conditions to the relief Southland seeks since the power of DOE to amend the Entitlements regulations expired after decontrol. Consequently, whether the OHA determines that refiners as a class have been injured by violations of the EPAA is irrelevant to

implementation of the relief ordered Southland by FERC. However, at this juncture, the OHA has determined that refiners as a class were injured and has established a fund to reimburse Southland-type claims. The method of payment will be determined in "Stage II" of these proceedings.

In *Navaho Refining Company v. DOE, supra,* Navaho, like Southland, sought summary judgment declaring its right to restitution of over four million dollars in excessive payments Navaho was required to make to the Entitlements Program. DOE argued, as they do here, that the implementation of the FERC order was conditioned on issuance of a January 1981 Entitlements List. DOE also argued that the FERC order was not final. The court determined that FERC found that Navaho paid excessive sums into the Entitlements Program. Consequently, the court found that there was nothing more for DOE to adjudicate. "All that is required is implementation of the relief that has already been ordered." Thus, the court granted Navaho summary judgment.

In *USA Petroleum v. DOE, supra,* the same issue was before the court. The FERC order contained identical language to the May 8, 1984, FERC order at issue here—"in the event no further Entitlement Notice is issued, DOE will take other appropriate action to implement this order." The court ruled that the FERC order clearly required some relief, even if it did not specify the relief, and that DOE has a duty to provide relief through appropriate action. The court reasoned that the Decontrol Order ended price control of oil; it did not change or cancel the already adjudicated exceptions given to participants in the program. Consequently, the court granted the motion of USA for partial summary judgment.

These decisions, although unpublished and subject to appeal, convince this Court of the error and of the totally frivolous nature of the DOE position. Consequently, this

Court grants the Motion of Southland for Partial Summary Judgment and denies the Motion of DOE to Dismiss or for Summary Judgment. Furthermore, the Court orders DOE to report to this Court within fifteen (15) days the method by which it intends to implement the May 8, 1984, FERC order, whether through means of the crude oil overcharge fund or otherwise.

2. *Motion of DOE to Stay.*

[4] DOE moves to stay proceedings in this Court pending final resolution of *Texaco, Inc. v. DOE, supra,* which it has appealed and which it claims will moot the Southland claim. As explained by Southland in opposition to the Motion to Stay, DOE advanced the same argument in *USA Petroleum v. DOE, supra,* and lost. As stated by the court in *USA Petroleum,* the "DOE in this connection . . . is a dishonest litigant" and their track record to date has been one of "delay—delay—delay." Moreover, this Court is appalled at the manner in which the DOE uses the *Texaco* appeal to its advantage, arguing in this case that *Texaco* will be affirmed and will moot the Southland claims and in *Mobil Oil Corporation v. DOE,* Civil Action No. 81-CV-340 (N.D.N.Y.) that *Texaco* will be reversed and moot the claims of Mobil Oil Corporation that the data upon which the DOE will base any entitlements list is erroneous. It seems that the DOE is playing fast and loose with federal courts across the United States. It ends here. The Motion to Stay is denied and the DOE will within fifteen (15) days of the entry of this Order present to this Court its plans for implementing the FERC order.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J81-0170(B)

VGS CORPORATION, D/B/A SOUTHLAND OIL COMPANY AND GLOBE ASPHALT CO., INC.,
Plaintiffs

VS.

UNITED STATES DEPARTMENT OF ENERGY AND JOHN S. HERRINGTON, AS SECRETARY OF ENERGY,
Defendants

[Filed Dec. 4, 1985]

MEMORANDUM OPINION

The Court has before it the Motion of Plaintiffs, VGS Corporation, d/b/a Southland Oil Company, and Globe Asphalt Co., Inc. ("Southland"), for Summary Judgment. Southland's Motion seeks a mandamus, directing Defendants, United States Department of Energy and John S. Herrington, as Secretary of Energy ("DOE"), to pay Southland, within twenty (20) days of entry of this Court's Order, the sum of $5,956.499.00 as required by the May 8, 1984, Order of the Federal Energy Regulatory Commission ("FERC"), with interest from the date of the FERC Order until paid, calculated at the rate approved in *United States* v. *Exxon*, 561 F.Supp. 816, 864 (D.D.C. 1983), *aff'd.*, TECA Nos. DC-91 through DC-100, Slip Op. (Temp. Emer.Ct. App. July 1, 1985).

DOE does not dispute that Southland will receive its exception relief from the entitlements program and submits that the only issues are when Southland will receive its exception relief and whether Southland is entitled to interest from the date of the FERC Order. DOE argues that a mandamus directing DOE when to pay is improper since the timing of payment is a matter within the agency's discretion.

Mandamus is appropriate pursuant to 28 U.S.C. § 1361 (1982), to "compel an officer or employee of the United States or any agency thereof to perform a duty owed the plaintiff" if three elements are satisfied: (1) the plaintiff has a clear right to the relief; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available. *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir. 1984); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132 (5th Cir. 1980).

There is no doubt that Southland has a clear right to the relief requested and that DOE has a clear duty to act. By virtue of the May 8, 1984, FERC Order, DOE is required to restore to Southland $5,956,499.00 which DOE wrongfully required Southland to pay under the Crude Oil Entitlements Program. By virtue of this Court's Memorandum Opinion and Order of July 12, 1985, in this case DOE has an unconditional and nondiscretionary obligation to implement the May 8, 1984, FERC Order which requires DOE to restore to Southland $5,956,499.00. The Court is also of the opinion that mandamus is the only adequate remedy available to Southland to obtain relief in light of DOE's past conduct in denying an obligation to afford relief and in delaying implementation of relief. Although DOE previously represented to the Court that the Office of Hearing and Appeal ("OHA") would implement relief if OHA found refiner class injury and although the OHA found refiner class injury and determined that a portion of crude oil overcharge funds would be used to fund

outstanding, finally adjudicated "receive orders" such as Southland's, DOE, in its June 21, 1985 decision, has required refiners with unpaid orders to file "applications" for payment, which, if "approved," would result in payment to a DOE escrow account pending resolution of the *Texaco v. DOE* litigation concerning issuance of final entitlements notices. As such, DOE has added yet another carrot to its stick. Yet, the DOE itself made resolution of the *Texaco* litigation and the issuance of further entitlements lists irrelevant to immediate payment of Southland by identifying crude oil overcharge funds as the source of payments. *See, e.g., Navaho Refining Company v. DOE*, Civil Action No. 83-1492-N (D.N.M. Sept. 27, 1985). Moreover, as the court in *Navaho Refining Company v. DOE*, Civil Action No. 83-1492-N (D.N.M July 23, 1985), commented "DOE has unilaterally granted its own stay by refusing to make any exception relief payments until after the *Texaco* dispute is over." This Court, in its previous ruling of July 12, 1985, specifically denied DOE's Motion to Stay this proceeding pending resolution of the *Texaco* litigation.

Under the statutory scheme for exception relief, 42 U.S.C. § 7194, DOE must insure that the exception relief it grants is meaningful and effective. *See Twin City Barge and Towing Company v. Slesinger*, 603 F.2d 197, 208 (TECA 1979). Moreover, DOE is required to conclude matters presented to it within a reasonable time. *Littlefield v. DOE*, 4 Energy Mgmt. Rep. (CCH) ¶ 26,492, 29,566 (D.D.C. June 29, 1984); *see also* 5 U.S.C. § 555H. DOE has violated both congressional mandates. *See Navaho Refining Company v. DOE, supra.* (D.N.M. July 23, 1985). Accordingly, mandamus is appropriate and will issue such that DOE will restore to Southland $5,156,499.00 within twenty (20) days of entry of this Order. *See Navaho Refining Company v. DOE, supra.*

Southland also seeks interest from the date of the FERC Order of May 8, 1984, calculated pursuant to

United States v. Exxon, supra. Southland notes that under DOE's June 21, 1985, Order, funds sufficient to pay exception orders are to be placed in an interest-bearing escrow account. Thus, Southland argues, DOE acknowledges its obligation to pay interest as compensation for the loss of the time-value of the money wrongfully taken from Southland. Yet, Southland claims that only by receiving interest from the date of the FERC Order will it be fully compensated for the loss of the time-value of this money. DOE simply argues that since Southland was not entitled to interest under the entitlements program, it is not entitled to interest here.

DOE's argument misses the point. We are no longer operating under the entitlements program by virtue of DOE's June 1984 decision not to issue further entitlements notices and its June 1985 decision that unpaid exception orders would be paid from crude oil overcharge funds if the OHA found refiner class injury. Thus, FERC's denial of interest of Southland is irrelevant to the present issue.

Pre-judgment interest is appropriate where the amount allegedly due was liquidated when the claim was originally made or where the denial of the claim was frivolous or in bad faith. *Piney Woods County Life School v. Shell Oil Company*, 539 F.Supp. 957, 988 (S.D.Miss. 1982), *aff'd in part, rev'd in part on other grounds*, 726 F.2d 225 (5th Cir. 1984. Southland's claim was reduced to a liquidated amount on May 1984, the date of the FERC Order. Moreover, this Court, in its Memorandum Opinion and Order of July 12, 1985, found that DOE's Motion to Dismiss or for Summary judgment was frivolous. Opinion, at 8. The basis of DOE's Motion was that it had a discretionary, conditional obligation to pay Southland pursuant to the FERC Order. In denying DOE's Motion as frivolous, the Court, in essence, found that DOE's denial of Southland's claim was frivolous.

Accordingly, Southland is entitled to pre-judgment interest from May 8, 1984, under either exception.

Southland further requests this Court to use the schedule of interest rates applied by the DOE in its administrative enforcement actions since February 1980. *See United States v. Exxon, supra.* Since DOE did not respond to this point, the Court will allow Southland to recover pre-judgment interest at the rate claimed.

A final judgment in accordance with this Memorandum Opinion will be entered.

ORDERED this the 4th day of December, 1985.

/s/ William H. Barbour, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J81-0170(B)

VGS CORPORATION, D/B/A SOUTHLAND OIL COMPANY AND GLOBE ASPHALT CO., INC.,
Plaintiffs

vs.

UNITED STATES DEPARTMENT OF ENERGY AND JOHN S. HERRINGTON, AS SECRETARY OF ENERGY,
Defendants

[Filed Dec. 4, 1985]

FINAL JUDGMENT

Upon consideration of Plaintiff's Motion for Summary Judgment, the briefs filed by the parties, and the entire record in this proceeding, all showing that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment as a matter of law; now, therefore,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant, Department of Energy shall pay to Plaintiff Southland Oil Company ("Southland"), within twenty days of entry of this Judgment, the sum of $5,956,499.00 as required by the May 8, 1984, Order of the Federal Energy Regulatory Commission ("FERC"), *Southland*

Oil Co./VGS Corp., 27 FERC ¶ 61,205 (May 8, 1984), with interest running from the date of such FERC Order to the date such sum is paid to Plaintiff Southland. Interest shall be calculated using the average prime rate for each calander quarter during that period, which shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate value published in the Federal Reserve Bulletin for the fourth, third, and second months preceding the first month of the calendar quarter, and shall be compounded quarterly. *See U.S. v. Exxon Corp.*, 561 F.Supp. 816, 864 (D.D.C. 1983), *aff'd.* TECA Nos. DC-91 through DC-100, Slip op. (Temp. Emer. Ct. App., July 1, 1985).

ORDERED this the 4th day of December 1985.

/s/ William H. Barbour, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J81-0170(B)

JUDGE WILLIAM H. BARBOUR, JR.
VGS CORPORATION, D/B/A SOUTHLAND OIL COMPANY
AND GLOBE ASPHALT CO., INC.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF ENERGY AND
JOHN S. HERRINGTON, AS SECRETARY OF ENERGY,
Defendants

[Filed Dec. 23, 1985]

STIPULATED ORDER

1. In accordance with the Court's judgment of December 4, 1985, defendant Department of Energy (DOE) will pay plaintiff VGS Corporation d/b/a Southland Oil Company (Southland) $5,956,499.00 pursuant to the terms of the Order of the Federal Energy Regulatory Commission (FERC) and interest in accordance with the agency's Order in *Amber Refining, Inc., et al.*, by December 24, 1985.

2. The parties agree that, upon receipt by Southland of said sums, payment of prejudgment interest from the date of the FERC Order will be stayed pending appeal by DOE to the Temporary Emergency Court of Appeals. Pending resolution of the prejudgment interest issue on

appeal, the amount of prejudgment interest shall be sequestered by DOE in an account bearing interest at the same rate as those administered under *Amber Refining, Inc., et al.*

3. DOE agrees, if an appeal is taken, to file its Notice of Appeal by January 3, 1986.

Respectfully submitted,

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SO ORDERED.

Date: 12-23-85

/s/ William H. Barbour, Jr.
United States District Judge

Section 504 of the Department of Energy Organization Act, 42 U.S.C. § 7194 (1982)

§ 7194. Requests for adjustments

(a) The Secretary or any officer designated by him shall provide for the making of such adjustments to any rule, regulation or order described in section 7191(a) of this title issued under the Federal Energy Administration Act [15 U.S.C. 761 et seq.], the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 et seq..], the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], or the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.], consistent with the other purposes of the relevant Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens, and shall by rule, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or recission of, exception to, or exemption from, such rule, regulation or order. The Secretary or any such officer shall additionally insure that each decision on any application or petition requesting an adjustment shall specify the standards of hardship, inequity, or unfair distribution of burden by which any disposition was made, and the specific application of such standards to the facts contained in any such application or petition.

(b)(1) If any person is aggrieved or adversely affected by a denial of a request for adjustment under subsection (a) of this section such person may request a review of such denial by the Commission and may obtain judicial review in accordance with this subchapter when such a denial becomes final.

(2) The Commission shall, by rule, establish appropriate procedures, including a hearing when requested, for review of a denial. Action by the Commission under this section shall be considered final agency action within

the meaning of section 704 of title 5 and shall not be subject to further review by the Secretary or any officer or employee of the Department. Litigation involving judicial review of such action shall be the responsibility of the Secretary.

(Pub. L. 95-91, title V, § 504, Aug. 4, 1977, 91 Stat. 590.)

Section 702 of the Administrative Procedure Act,
as amended, 5 U.S.C. § 702 (1982)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other that money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1134

In the Supreme Court of the United States

OCTOBER TERM, 1986

VGS CORPORATION d/b/a SOUTHLAND OIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether sovereign immunity bars petitioners' claim for prejudgment interest against the United States.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 808 F.2d 842. The opinion of the district court (Pet. App. 21a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1986. The petition for a writ of certiorari was filed on January 8, 1987. The jurisdic-

tion of this Court arises under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. 754(a)(1).

STATEMENT

1. a. The Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 751 *et seq.*, and regulations promulgated under it mandated a now-defunct system of price controls on domestic crude oil. In order to offset the competitive disadvantage this system imposed on refiners with below-average access to price-controlled domestic crude oil, the Department of Energy (DOE or the Department) established the "entitlements program," 10 C.F.R. 211.67 (1980), a system of transfer payments under which refiners with greater access to price-controlled crude oil were required to purchase "entitlements" from refiners with less access to such oil. DOE issued monthly "entitlements notices" specifying the number of entitlements each refiner was obligated to buy, or permitted to sell, that month. See generally *Husky Oil Co.* v. *DOE*, 582 F.2d 644, 645-647 (T.E.C.A. 1978).

Section 504 of the Department of Energy Organization Act, 42 U.S.C. 7194, authorizes "exception relief," awarded on a case-by-case basis by DOE's Office of Hearings and Appeals (OHA), to refiners found to be suffering a gross inequity or a serious hardship caused by the price control and entitlements program. See 10 C.F.R. 205.50 *et seq.* (1984). OHA generally awarded exception relief prospectively, based on projections of a firm's future performance. The relief took the form of excusing the firm from purchasing (or permitting the firm to sell) a specified

quantity of entitlements in a future period. Since the relief was initially based on a projection, it was subject to OHA review of actual data after the end of a firm's fiscal year. Based on that review, OHA would issue a final relief order. If the final order differed from the projection, the firm would be permitted to sell, or required to buy, entitlements on the next entitlements notice. OHA denials of exception relief could be appealed to the Federal Energy Regulatory Commission (FERC) (see 42 U.S.C. 7194(b)(1)). Pet. App. 2a-3a.

b. The crude oil price control program was terminated, as a general matter, on January 28, 1981, by Executive Order No. 12,287. 3 C.F.R. 124 (1982). This left DOE with questions as to how to wind down the entitlements program. In February 1981, DOE issued an entitlements notice for December 1980 and announced that it would issue an entitlements notice for the first 27 days of January 1981, but the latter was delayed by a series of injunctions.[1] Eventually DOE determined that it would terminate the entitlements program without issuing any further entitle-

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[1] The series of preliminary injunctions preventing publication of entitlements notices after decontrol culminated in the injunction issued in *Mobil Oil Corp.* v. *DOE*, 520 F. Supp. 420 (N.D.N.Y. 1981). While the Temporary Emergency Court of Appeals reversed the district court's preliminary injunction (659 F.2d 150 (1981)), its mandate was stayed until this Court denied certiorari on December 7, 1981 (454 U.S. 1110). By that time, however, other related litigation was under way, which called into question the propriety of employing certain data that would be used to calculate entitlements notices. This litigation was not finally resolved in DOE's favor until 1983. *Union Oil Co. of California* v. *DOE*, 688 F.2d 797, 801-802 (T.E.C.A. 1982), cert. denied, 459 U.S. 1202 (1983). See generally 49 Fed. Reg. 27410, 27413 (1984).

ments notices after the December 1980 notice. 49 Fed. Reg. 27410, 27413 (1984); 46 Fed. Reg. 12945, 12946 (1981). Challenges to this decision were rejected by the Temporary Emergency Court of Appeals (TECA). *Texaco, Inc.* v. *DOE*, 795 F.2d 1021 (1986), cert. dismissed, No. 86-187 (Aug. 19, 1986) ("*Texaco* litigation").

The end of the entitlements program eliminated the mechanism by which "exception relief" had been implemented. Of particular relevance here, it eliminated the mechanism for making adjustments required by final OHA exception relief awards, made after January 1981, that adjusted the provisional awards made for prior periods. After considering how to deal with this problem, DOE on January 9, 1985, issued a "Final Decision" stating that refiners that would otherwise have been permitted, on account of exception relief, to sell entitlements should be paid their exception relief in an alternate manner that "would be fair to firms with [such] * * * orders," yet would still be "in keeping with the transition from a regulated to a deregulated market and with the objectives of the EPAA." 50 Fed. Reg. 1919, 1921 (1985). Specifically, the Final Decision stated that if OHA determined that refiners as a class had been injured by violations of the EPAA regulations, DOE would pay such exception relief as might be due out of the Department's crude oil "overcharge fund," made up of penalties paid by companies in crude oil overcharge actions. Thus, DOE determined on January 9, 1985, that it should undertake to award exception relief from a fund in *its* charge, rather than prolong the entitlements program as a source for such exception relief. The Final Decision, which was not

challenged in this litigation, made no provision for the addition of interest to exception relief payments. See 50 Fed. Reg. 1921-1922.[2]

At the time of the Final Decision, the challenge in the *Texaco* litigation to DOE's decision not to issue further entitlements notices had not yet been resolved in DOE's favor. Had DOE lost this challenge, there was still the possibility that exception relief would be paid by means of entitlements notices. Accordingly, OHA concluded that "any payment pursuant to [DOE's Final Decision] * * * will be placed in an interest-bearing escrow account pending the outcome of [the *Texaco*] litigation." 50 Fed. Reg. 27402, 27403 n.1 (1985). On October 2, 1985, OHA issued an order establishing interest-bearing escrow accounts for firms awarded exception relief. 50 Fed. Reg. 41572. In that order, OHA responded to comments from various firms, including petitioners, who asserted that in addition to interest that would accrue once the escrow accounts were established, retroactive interest should be paid to each recipient of relief from the date of its award. OHA rejected this contention, emphasizing that "if the final Entitlements Notices were to be issued, DOE would clearly lack the authority under [its] regulations to require refiner-buyers to add interest to their payments to refiner-sellers" (*id.* at 41575 (footnote omitted)).

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[2] On June 21, 1985, OHA made the necessary finding that refiners as a class had indeed been injured by violations of the EPAA regulations (50 Fed. Reg. 27400-27401), and announced the implementation of the January 9, 1985, Final Decision, permitting those entitled to exception relief to apply for payment from the overcharge fund (*id.* at 27402-27403).

OHA also explained that interest had never been awarded in an entitlements exception case during the program's history, in spite of routine substantial delays in making necessary adjustments. Since use of the overcharge monies was "strictly a substitute method for funding receive orders," OHA found that retroactive interest was not appropriate (*ibid.*).

2. a. Petitioners' claims against DOE arose out of two OHA orders, issued on February 23, 1981, recalculating and reducing petitioner Southland's exception relief for 1977 and 1978 and requiring Southland to buy an additional $13.4 million in entitlements. Southland paid this amount on the December 1980 entitlements notice but also challenged the orders in two ways: it appealed the orders to FERC, and it sought and obtained a preliminary injunction from the U.S. District Court for the Southern District of Mississippi. The injunction directed that in the January entitlements notice Southland be permitted to sell entitlements so that it would receive back the amount it had been required by the orders to pay, which would be placed in an interest-bearing escrow account and ultimately paid to Southland to the extent it prevailed before FERC. Pet. App. 3a-4a. This mechanism was never implemented, however, because as noted above no January entitlements notice was ever issued. 49 Fed. Reg. 27410 (1984).

On May 8, 1984, FERC adopted a decision of its presiding official that OHA had miscalculated Southland's exception relief, and that Southland would be permitted to sell $5,956,499 worth of entitlements on the next entitlements notice, but that "[i]n the event no further entitlements notice is issued, DOE will take other appropriate action to implement this order." *Southland Oil Company/VGS Corp.*, 25 F.E.R.C.

¶ 62,118, at 63,260 (1983), adopted by 27 F.E.R.C. ¶ 61,205 (1984). In reaching this conclusion, the presiding official specifically rejected petitioners' claim that interest be added to this amount (25 F.E.R.C. at 63,258-63,259). The full Commission concluded that "[Southland] has not shown that it is entitled to any interest on the entitlements it was required to purchase in February 1981" (27 F.E.R.C. at 61,398).

b. On March 6, 1985, petitioners filed their amended complaint in this case, requesting that the district court require DOE to "implement" the FERC order immediately. The amended complaint did not challenge DOE's January 9, 1985, Final Decision to pay exception relief from the overcharge funds, nor did it specifically seek interest. DOE argued that petitioners' action had become moot, since petitioners were guaranteed to receive their entitlements exception relief, either by means of the overcharge funds if DOE prevailed in *Texaco*, or by means of entitlements notices if it did not. Pet. App. 11a-13a.

The district court ruled on July 12, 1985, that petitioners were "entitled to a declaratory judgment that the DOE has an unconditional and non-discretionary obligation to implement the May 8, 1984, FERC order, requiring DOE to restore to [petitioners] $5,956,499.00" (Pet. App. 17a-18a). The court held that the positions taken by DOE were "frivolous" (*id.* at 18a) and castigated the agency for what it perceived was a calculated policy of delay (*id.* at 20a).

On December 4, 1985, the district court granted petitioners' motion for summary judgment and directed DOE to make payment within 20 days of the exception relief granted by the FERC order plus in-

terest from May 8, 1984, the date of the FERC order (Pet. App. 21a-25a). On December 20, 1985, DOE paid petitioners $6,055,390, representing its $5,956,499 exception relief award plus $98,891 of interest that had accrued on its escrow since October 2, 1985, the date on which DOE created the interest-bearing escrow accounts out of the overcharge fund. See *id.* at 6a; page 5, *supra*. DOE did not pay interest for the period from May 8, 1984, to October 2, 1985. Instead, per stipulated order, this amount was sequestered by DOE in an interest-bearing account pending appeal (see Pet. App. 28a-29a).

On the interest issue, the district court asserted that since the payment to petitioners was coming from the crude oil overcharge funds, DOE's position that petitioners would not have been entitled to interest during the entitlements program itself "misses the point," and that "FERC's denial of interest to [petitioners] is irrelevant to the present issue" (Pet. App. 24a). Rather, the court held, "[p]re-judgment interest is appropriate where the amount allegedly due was liquidated when the claim was originally made or where the denial of the claim was frivolous or in bad faith" (*ibid.* (citation omitted)). The court held that petitioners were entitled to interest under either test. Although DOE contended that the claim for interest was barred by sovereign immunity, the court did not discuss the issue in its opinion.

c. DOE appealed the prejudgment interest ruling to the court of appeals, which reversed (Pet. App. 1a-10a), holding that "the doctrine of sovereign immunity precludes an award of prejudgment interest" (*id.* at 7a). The court applied the longstanding rule laid down by this Court that "in the absence of a *specific* provision in a contract or statute, or express

consent by Congress, interest does not run on a claim against the United States" (*ibid.* (emphasis in original)). The court held that there was no statutory authority for payment of interest by the government (*id.* at 9a-10a).

ARGUMENT

1. The court of appeals' decision does not warrant this Court's review because the dispute is, to say the least, sui generis. It turns on the nature of petitioners' claim arising on account of DOE's ad hoc determination to use particular funds—the overcharge funds—to make an equitable arrangement to deal with claims remaining after the termination of a once elaborate but now defunct program of transfer payments within an industry.[3] There is, of course, no conflict among the courts of appeals: only the specialized Temporary Emergency Court of Appeals could have heard such a case. See 12 U.S.C. 1904 note (§ 211(b)(2)), as incorporated by 15 U.S.C. 754(a)(1); *Bray* v. *United States*, 423 U.S. 73, 74 (1975).

2. In any event, the decision of the court of appeals was correct. It routinely applied the firmly established rule, reaffirmed by this Court only last Term, that "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 1. Congress is well aware of the presumption which runs against an award of prejudgment interest against the government. It can

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[3] The EPAA, which provided the statutory authority for the entitlements program, expired on September 30, 1981. See 15 U.S.C. 760(g).

provide for such an award if it deems it wise, and it has not so provided here. Cf. *id.* at 8; compare Pet. 18 & n.12.

Petitioners attempt to distinguish the long line of precedents in this Court, on which TECA relied, by asserting that in those cases "the disputed interest had accrued on funds which the federal government had collected for its own benefit," while "[t]his case involves no claim on funds which the government has asserted are its own" (Pet. 12, 15). But the assertion that in this case the underlying funds were not claimed by the United States is both irrelevant and false.

a. The no-interest rule derives from the more general principle that "the United States, in the absence of its consent, is immune from suit." *Library of Congress* v. *Shaw*, slip op. 5 (citation omitted). Petitioners cannot seriously dispute that their suit is against the United States, and that the United States has not consented to make the payment they seek. No statute involved in this litigation provides for the award of prejudgment interest against the government. That should end the matter.

The prejudgment interest petitioners claim would have to be paid out of money that would otherwise belong to the federal government and remain in the Treasury. The distribution of monies in the overcharge fund is governed by the May 5, 1986, settlement in *In re DOE Stripper Well Exemption Litigation*, 578 F.Supp. 586 (D. Kan. 1983), which provides that the federal government, state governments, and various segments of the petroleum industry will receive specified shares. The settlement[4]—to which

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[4] Part V.G. of the settlement (at 17) provides in its entirety:

petitioners are parties—specifically provides that any funds required for exception relief, including any interest if awarded by a court, are to be paid by the federal government "out of *its* share of funds under this Agreement, or out of funds * * * to which no other Party [*i.e.*, besides the federal government] has a claim by virtue of this Agreement" (emphasis added).[5]

Preservation of Entitlements Claims. This Agreement specifically excludes and preserves any and all claims by a Refiner applicant against DOE for payment by DOE of (i) exception relief from the crude oil Entitlements Program including, but not limited to, exceptions or adjustments based on or pursuant to *Delta/Beacon* or Naptha Entitlements relief [particular types of entitlements exception relief], which has been or may be granted by the [Economic Regulatory Administration], OHA, the Federal Energy Regulatory Commission, or any court or (ii) any adjustments or changes to the draft January 1981 Notice or Entitlements Adjustment Notice. This Agreement also specifically excludes any and all claims by a Refiner against DOE for interest on such adjustment or change or exception relief and for attorneys' fees and costs incurred in connection with such relief. DOE agrees to provide all funds necessary to fund and pay all amounts determined to be due any Refiner pursuant to or as a result of any such adjustments or changes or relief including such interest and attorneys' fees, if awarded, out of its share of funds under this Agreement, or out of funds (other than funds resulting from violations or alleged violations except Alleged Crude Oil Violations) to which no other Party has a claim by virtue of this Agreement. DOE's obligations shall not affect the amount or timing of any payment to any other Party made pursuant to this Agreement.

We have lodged a copy of the settlement with the Court.

[5] Prior to the settlement, DOE first planned, in the absence of contrary instructions from Congress, that *all* moneys in the overcharge fund would be paid to the Treasury; later, as dis-

Thus, *United States* v. *N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947)—on which the court of appeals here relied—is controlling. There the Customs Court had decided in 1937 that a refund of customs duties was owed by the government; however, the companies that had originally sought the refund had since been dissolved. The refund was accordingly forwarded to the Comptroller General, who deposited the money in a trust fund in the United States Treasury and refused to pay the various claimants without a judicial decision as to ownership. The Court of Claims designated the proper claimant, and awarded prejudgment interest to run from April 19, 1941, the date of a change in state law clarifying the capacity of a dissolved corporation to maintain a suit. This Court reversed the award of prejudgment interest, because there was no consent on the part of the government that interest should be paid. The award of interest that was barred by this Court in *N.Y. Rayon* was for the period in which, as described by the court of appeals here, "the government had no claim to these funds" and "was merely holding the money until the rightful owner appeared." Pet. App. 9a; see 329 U.S. at 659-660, 661; see also *United States* v. *Louisiana*, 446 U.S. 253, 261-266 (1980) (U.S. not required to pay interest to Louisiana on impounded funds eventually awarded to the State).[6]

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cussed above, it planned to make payments from the fund for exceptions relief, but did not contemplate the payment of interest. At any time, then, a payment of prejudgment interest would have been out of the U.S. Treasury. See generally 50 Fed. Reg. 27400, 27402, 27403 (1985).

[6] Petitioners assert (Pet. 13-14) that the court of appeals' decision is contrary to *Miller* v. *Robertson*, 266 U.S. 243

b. Moreover, the overcharge funds from which petitioners were paid the principal amount of their claim ($5,956,499) and from which they seek prejudgment interest were collected by DOE in the enforcement of its regulations, and from the outset the federal government *did* claim an interest in them. DOE's initial policy was that, absent specific congressional direction to the contrary, all amounts held in the overcharge escrow would be paid to the general fund of the U.S. Treasury.[7] This policy was modified as noted above—first by the decision to pay entitlements relief out of the overcharge fund, and later by the settlement in *In re DOE Stripper Well Exemption*

(1924), where the Court upheld an award of interest on a claim against property seized by the government under the Trading with the Enemy Act. See also *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). If the decisions in those cases had been as broad as petitioners suggest, they would have been limited by *N.Y. Rayon*, as petitioners appear to recognize (see Pet. 17). But in fact there is no conflict. In *Miller*, the Court stressed that the claim was not against the United States (266 U.S. at 257), and it is unclear whether it was the government that had to pay the interest (see *id.* at 259 ("The proposition that the enemy defendants, as a matter of law, are entitled to be relieved from interest during the war cannot be sustained") (citations omitted)). In *Henkels*, the assets seized—mistakenly, as it turned out—had been plaintiff's at the time of the seizure and had been segregated along with other such assets and invested by the government. Here, petitioners' claim is for interest on the amount of their claim for the period *before* the money they ultimately received was placed in separate escrow.

[7] The statutory authority for the overcharge fund, 12 U.S.C. 1904 note (§ 209), said only that courts could "order restitution of moneys received" through overcharges; it did not specify who would receive the restitution.

Litigation, *supra*, providing that crude oil overcharge funds are to be divided between the federal government, the governments of the various states, and various segments of the petroleum industry. It was not clear until after the *Texaco* litigation, however, that petitioners should be paid from the overcharge fund, and until that time the government had a "claim" on petitioners' "share" of the funds insofar as it had a duty to ensure that they were paid to the proper party. Whether that party was the federal government, a state, petitioners, or another refiner, the point remains that the funds were properly in the possession of the federal government, which was—on its own behalf and for others—in good faith resisting petitioners' claim to them. See generally 50 Fed. Reg. 27400, 27402, 27403 (1985).

Finally, had DOE decided to issue a new entitlements notice or not to make exception relief payments from the overcharge fund, petitioners would clearly have been unable to claim prejudgment interest against anyone. To make an award against DOE would, therefore, be anomalous and would punish it for making the fundamental and good faith policy decisions it did.

3. Petitioners also assert that "TECA's reversal of the District Court's interest award is directly contrary to the language and intent of the 1976 amendment to § 702 of the Administrative Procedure Act [5 U.S.C. 702]" (Pet. 18), which waives sovereign immunity for actions against the United States which seek relief other than money damages. As petitioners indicate (*id.* at 20), the court of appeals ignored this argument in its opinion.

The argument was presumably ignored because it is wholly without merit. In the first place, Section

702 of the Administrative Procedure Act was inapplicable to the entire entitlements program. The EPAA—pursuant to which the entitlements regulations were promulgated and revoked—incorporated by reference Section 207 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note. 15 U.S.C. 754(a)(1)(A). And Section 207 specifically stated that "[t]he functions exercised under this title are excluded from the operation of * * * chapter 7 of title 5, United States Code," in which is found 5 U.S.C. 702. See also *Pasco, Inc.* v. *Federal Energy Administration*, 525 F.2d 1391, 1405 n.26 (T.E.C.A. 1975); *Carpenters 46 County Conference Board* v. *Construction Industry Stabilization Committee*, 522 F.2d 637, 639 n.5 (T.E.C.A. 1975). In the second place, Section 702 does not waive sovereign immunity for claims of "money damages," and it is well established that "[p]rejudgment interest * * * is considered as damages." *Library of Congress* v. *Shaw*, slip op. 11 (citations omitted); see also *id.* at 4-5.

In any event, the clear and unambiguous waiver of sovereign immunity necessary to justify an award of prejudgment interest is entirely lacking. Petitioners point to nothing in the amendment to Section 702 or its legislative history to indicate that it was intended to affect the no-interest rule, and they do not assert that any court has ever so held. The need for some evidence of intent is heightened since petitioners' construction would apply to any action governed by Section 702—indeed, according to petitioners, it would apply to any action against the federal government (see Pet. 21). Similarly, if one accepts petitioners' contention that the award of interest here is permissible because the district court made it in the exercise of its "equitable powers" (Pet. 19-21), this

would enable any court to make such an award in any case, thus completely negating the strong presumption against allowing prejudgment interest. The contention that courts should be allowed to award interest against the sovereign where they deem it equitable was rejected by this Court in *N.Y. Rayon*, which stated that "[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy" or on the basis of what they think to be "just or equitable" (329 U.S. at 660, 663).[8] There is simply no reason to suppose that Congress intended an exception to that rule.

---

[8] In this context, petitioners call upon the Court to rectify the results of "agency misconduct," evidenced by the amount of time DOE took to pay petitioners their exception relief (Pet. 21). While both TECA and the district court expressed dismay at the delay in payment, we note that the latter denied petitioners' motion under the Equal Access to Justice Act, 28 U.S.C. 2412(b), for attorney fees in this matter, because it found no "bad faith" in the agency's actions. Order, Civ. No. J81-0170(B) (May 20, 1986). We also note that the Comptroller General, in an opinion on this and related matters, concluded that DOE's payment before the conclusion of all related litigation was "premature." Op. of the Comptroller General, B-21076.2, .3, .4 (Feb. 7, 1986), slip op. 6-8. While we do not agree with this opinion, it certainly would seem to indicate that this is an issue on which serious, good faith disagreement is possible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40288

Supreme Court, U.S.
FILED
MAR 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF OF AMICUS CURIAE BEACON OIL COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where funds, obtained by an administrative agency from private parties in enforcement proceedings, are retained in an interest-bearing escrow account for the benefit of parties found to have been injured by regulatory violations, and where the government has never claimed a right to those funds, whether the court of appeals erred in ruling that parties found by the administrative agency to be entitled to the funds are barred by sovereign immunity from recovering their *pro rata* share of the accrued interest on those funds.

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BRIEF OF AMICUS CURIAE BEACON OIL COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

Beacon Oil Company (Beacon) respectfully submits this brief in support of Petitioners. Like Petitioners, at all relevant times, Beacon was a small and independent refiner as those terms are defined in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 et seq. (1982). The company's only refinery is located in Hanford, California. Beacon markets its refined products principally in California.

Also like Petitioners, Beacon secured final administrative orders determining that Beacon was entitled to a

refund of monies which the Department of Energy erroneously required Beacon to pay into the agency's Crude Oil Entitlements Program. As fully described by Petitioner (Pet. at 3), the Entitlements Program required refiners to make cash payments to other refiners to equalize the economic benefits of access to price-controlled crude oil. No funds were paid to the government and no funds were paid by the government.

In 1981, the Department of Energy's Office of Hearings and Appeals found that Beacon was suffering severe financial hardship as a result of overpayments the Department erroneously required Beacon to make to the Entitlements Program in 1979. Accordingly, the Department's Office of Hearings and Appeals determined that Beacon was entitled to recover $816,122 (the amount of the overpayment) from the Entitlements Program.[1] *Beacon Oil Company*, 8 DOE Energy Mgmt. (CCH) ¶ 82,604 (1981). Similarly, in 1982, the Federal Energy Regulatory Commission, an independent appellate tribunal within the Department of Energy, found that because of severe financial hardship resulting from overpayments that the Department of Energy had erroneously required Beacon to make to the Entitlements Program in 1980, Beacon was entitled to recover $2,617,521 from the Entitlements Program. *Beacon Oil Company*, 21 FERC Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,130 (1982).

Like Petitioners, Beacon was required to struggle for several years to secure compliance by DOE with these final administrative orders. Finally, as a result of rulings by several district courts, including a ruling secured by Petitioners in 1985, the Department of Energy complied with its final administrative orders and returned to Petitioners, Beacon, and other similarly situated companies the money that the agency had erroneously

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[1] Pursuant to 42 U.S.C. § 7194, the Department of Energy was required by Congress to grant so-called exception relief to remedy hardships or inequities caused by the DOE's regulations.

required these companies to pay to other refiner-participants in the Entitlements Program. The money was paid from an interest-bearing escrow account established by the Department for the benefit of firms and individuals determined to be entitled to the funds in the account. The Department, which never claimed a beneficial interest in the funds, determined that Petitioners, Beacon, and other similarly situated firms were proper claimants of these escrowed funds. Nevertheless, the Department refused to pay Beacon or Petitioners the full amount of the interest earned by the funds in the account.

STATEMENT

Regulatory Background

From 1973 through 1981 the price of crude oil and refined petroleum products sold in the United States was subject to regulations promulgated and enforced by the Department of Energy and its predecessor agencies.[2] During that period, DOE sought to enforce its regulations by requiring firms that had charged prices in excess of those permitted by the regulations to refund the overcharges to the persons or parties injured by such overcharges.

In some instances, however, it was not a simple matter to determine exactly who suffered injury as a result of the overcharges, and the extent of that injury. This was especially true of regulatory violations committed by crude oil producers because of the operation of DOE's Entitlements Program which, in effect, spread the impact of such violations to all domestic refiners and their customers.

As a result of the inherent difficulty in ascertaining who suffered injury as a result of pricing violations, and

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[2] For simplicity the Department of Energy and its predecessor agencies shall be referred to collectively as DOE.

the extent of each such injury, DOE adopted regulations (the Subpart V Regulations), 10 C.F.R. § 205.280 et seq. (1986) for distributing funds which the agency collected in enforcement proceedings. These regulations established—

> special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified by a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive.

10 C.F.R. § 205.280 (1986). The Subpart V regulations explicitly authorize the deposit of the enforcement funds in an interest-bearing escrow account until they are distributed to rightful claimants. 10 C.F.R. § 205.287(a) (1986). The regulations also contemplate that the interest earned on the escrowed funds is to accumulate for the benefit of successful claimants:

> The aggregate amount of all refunds approved by the Office of Hearing and Appeals or its designee in a given case shall not exceed the amount to be remitted pursuant to the relevant DOE enforcement order, *plus any accumulated interest*, reduced by the amount of any administrative costs approved by the Office of Hearings and Appeals.

10 C.F.R. § 205.286(a) (1986) (emphasis added).

The Overcharge-Escrow Account

Over the years DOE took custody of funds remitted pursuant to Consent Orders or Remedial Orders in over 250 cases involving alleged crude-oil-pricing violations. Under the authority of the Subpart V Regulations these

funds were transferred to DOE's Office of Hearings and Appeals which immediately deposited them in an interest-bearing escrow account pending resolution of the Subpart V proceedings.[3] *See, e.g.*, 47 Fed. Reg. 4583 (1982); 47 Fed. Reg. 16,382 (1982); 49 Fed. Reg. 44,541 (1984). These 250 cases were ultimately consolidated into four Subpart V proceedings involving approximately $200 million in principal alone ("the overcharge-escrow account"). *See* 50 Fed. Reg. 1919, 1921 (1985).

Entitlements Exceptions Relief Proceedings

While the $200 million was earning interest, Petitioners and *amicus* Beacon secured final administrative orders ruling that, in order to remedy severe financial hardship and gross inequity, they were entitled to recover the money that DOE had erroneously required them to pay into the Entitlements Program. These orders afforded DOE the discretion to provide the mandated repayment either through operation of the Entitlements Program or through any equivalent mechanism if the agency chose to terminate the Entitlements Program.

As fully set forth by Petitioners (Pet. at 4-10), efforts were made over the course of years to secure satisfaction of the final administrative orders. DOE, however, invoked one excuse after another for its failure to pay Petitioners and Beacon the principal on the sum that the administrative orders had determined Petitioners and Beacon were entitled to recover in order to remedy serious financial hardship. Thus, notwithstanding the finding that Beacon suffered serious financial hardship in 1979 and 1980 as a direct result of DOE's error in re-

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[3] Custody of these funds were initially taken by DOE's Office of Enforcement or Office of Special Counsel—the prosecutorial offices within DOE. The funds were held in escrow by those offices until DOE's Office of Hearings and Appeals assumed jurisdiction under Subpart V.

quiring the company to pay $3.4 million into the Entitlements Program, and that Beacon was entitled to recover this money, DOE withheld this relief from Beacon.

Only in 1985, after four district courts had ordered DOE to implement the agency's own final orders granting exception relief (Pet. at 9 & n.7) did DOE announce that Petitioners, Beacon and other similarly situated companies would receive their money from the overcharge-escrow account. DOE took this belated action because its Office of Hearings and Appeals determined that refiners, as a class, were injured by price control violations committed by crude oil producers. As a result, DOE determined that Petitioners, Beacon and other similarly situated companies were rightful claimants to the overcharge-escrow funds. 50 Fed. Reg. 27,402, 27,403 (1985). Based on its determination that Petitioners and Beacon were beneficiaries of the overcharge-escrow funds, DOE finally paid Petitioners and Beacon, out of the overcharge-escrow account, the sums required to be paid by the agency's own long-standing final orders.

DOE did not, however, pay Petitioners or Beacon the full amount of interest that had accrued on the overcharge-escrow funds. In violation of its own regulations, DOE refused to include Petitioners' and Beacon's *pro rata* share of the accumulated interest as part of their recovery from the overcharge-escrow account notwithstanding the fact that (1) the overcharge-escrow funds were deposited in an interest-bearing escrow account, as authorized by Subpart V; (2) DOE found that Petitioners and Beacon were beneficiaries of the funds in that account; (3) under Subpart V the interest was to accumulate for the benefit of successful claimants; and (4) DOE has never claimed a beneficial interest in the overcharge-escrow account or on the interest that accrued on the funds in that account. 50 Fed. Reg. 41,572, 41,575 (1985). Rather, DOE agreed to pay *some* inter-

est, *i.e.*, interest accruing from October 1985—a date chosen totally at random.[4]

The Court of Appeals' Ruling

DOE did not appeal any of the district court orders requiring payment of principal (Pet. at 10). Rather, the only issue presented to the court of appeals was whether DOE was required to pay Petitioners the interest that had accumulated on the funds in the overcharge-escrow account.

The court of appeals did not treat the issue before it as the propriety of awarding the successful claimant of escrowed funds the interest that had accrued on those funds. Rather, the court of appeals viewed the issue as being simply whether interest was awardable against the United States, and simplistically applied the general rule that "sovereign immunity precludes an award of pre-judgment interest against DOE . . . ." Pet. App. at 7a. The extent of the court's rationale was that the claim for the accumulated interest on the escrowed funds was a "claim against the United States", *id.*:

> *It is significant that the* [*Supreme*] *Court has never considered the nature of the account to be in any way important.* It makes no difference whether the money has been set up as a "separate trust fund" or a "separate account" or, as in this case "as a separate interest-bearing account in the United States Treasury . . . ." The Treasury has the money and the claim is against the United States to recover that money. This is sufficient to bring sovereign immunity into play.

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[4] This action is totally inconsistent with DOE's conduct in similar cases. *See, e.g.*, Texas Oil and Gas Corporation/Mobil Oil Corporation, 14 DOE Energy Mgmt. (CCH) ¶ 85,029 at 88,056 (1986), which granted Mobil Oil Corporation a share of an overcharge-escrow fund, established under Subpart V, plus "interest of $1,166,730 accrued since the consent order funds were deposited into the escrow account." Beacon is aware of no other case in which accumulated interest was not made a part of a Subpart V award.

Pet. App. at 9a (emphasis added). The court of appeals thus ignored the purposes and policy justifications for the sovereign immunity doctrine. Rather, the court looked solely to the fact that "[t]he Treasury has the money" and failed to consider (1) that the United States had never claimed a beneficial interest in the escrowed funds; and (2) that the funds were being held in an interest-bearing escrow account for the benefit of Petitioners and Beacon. Thus, the court extended the sovereign immunity doctrine to interest earned on monies held in escrow for private parties, despite the fact that the government has never claimed a beneficial interest in the escrowed funds.

REASONS FOR GRANTING THE WRIT

The decision by the court of appeals that sovereign immunity bars a claim for the accumulated interest on private funds held in escrow, by the United States, for their rightful owner is an unwarranted and unprecedented expansion of the sovereign immunity doctrine. A claim for interest *earned* on escrowed private funds is not a claim for interest to be paid by the United States Treasury. Indeed, it is well-established that interest earned on escrowed funds "follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). The overcharge-escrow funds are undeniably private funds—the government has never claimed a beneficial interest in the principal. The mere fact that such funds were in the temporary possession of the United States cannot convert such private funds into public funds. By ruling that recovery of the accrued interest is barred by sovereign immunity, however, the court of appeals has either ruled that (1) the interest is public money although the principal is private money; or (2) the sovereign immunity doctrine bars the recovery of private funds simply be-

cause such funds were temporarily in the possession of the United States. In either case, the court of appeals' expansion of the sovereign immunity doctrine flies in the face of both logic and precedent. In *Henkels v. Sutherland*, 271 U.S. 298 (1926), this Court unequivocally held that a claim for interest earned on private property held by the federal government is not barred by sovereign immunity. *See also Webb's Fabulous Pharmacies, supra.* These cases were simply ignored by the court of appeals.

The impact of the ruling below extends far beyond both the litigants in this case and the DOE regulatory program. The status of interest earned on funds held by the United States has become increasingly important in recent years as the role of the federal government as collector of and repository for escrowed funds has greatly increased. The DOE is not the only federal agency administering hundreds of millions of dollars in interest-bearing escrow accounts. The Securities and Exchange Commsision, the Federal Trade Commission and the Consumer Product Safety Commission routinely recover millions of dollars from violators of various federal statutes, hold such money in escrow, and seek to return it to the parties injured by the statutory violations. Moreover, under 28 U.S.C. §§ 2041, 2042 (1982), federal courts administer millions of dollars in escrow accounts. Since 1983, Fed. R. Civ. P. 67 requires such accounts to be interest-bearing.

Finally, if the sovereign immunity doctrine is expanded to bar recovery of interest earned on private funds held in escrow by federal agencies, on the theory that such interest belongs to the government, such agencies will be encouraged to delay disbursing funds to their rightful owners because the funds will be earning interest for the government as long as they remain in the possession of the government.

A. The Soverign Immunity Doctrine

It is well-established that the purpose of the sovereign immunity doctrine is to prevent litigation from interfering with public acts that are essential to govern the nation. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *United States v. Lee*, 106 U.S. (16 Otto) 196 (1882); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868). Thus, the rule has evolved that in the absence of a waiver, the doctrine bars recovery of a judgment which would "expend itself on the public treasury or domain, or interfere with the public administration." *Land v. Dollar*, 330 U.S. 731, 738 (1947). In recent years, however, the doctrine has been viewed with some disfavor, being criticized as "irrational and immoral" with "little doctrinal coherence." *Interfirst Bank Dallas, N.A. v. United States*, 769 F.2d 299, 302 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1458 (1986). While the doctrine has, nevertheless, "been repeatedly upheld by the Supreme Court, and though limited by Congress, has never been waived generally", *id.*, there is no basis whatsoever for expanding the doctrine to bar recovery of interest, earned on private funds, where the government has never claimed a beneficial interest in those funds.

B. The Sovereign Immunity Doctrine Does Not Bar Recovery Of Accrued Interest On Private Funds Held In An Interest-Bearing Escrow Account Where The Government Has Not Claimed A Beneficial Interest In The Principal

The court of appeals began and ended its analysis of this case with the observation that the "Treasury has the money and the claim is against the United States to recover that money." Pet. App. 9a. This, however, does not end the inquiry. The claim for interest in this case was not one for interest to be paid by the United States. Rather, it was a claim for interest *earned* on escrowed funds that DOE determined belonged to Petitioners and

Amicus Beacon. In refusing to recognize this distinction, the court of appeals ignored both common sense and unambiguous precedent of this Court.

More than sixty years ago, in *Henkels v. Sutherland*, 271 U.S. 298 (1926), this Court ruled that sovereign immunity did *not* bar recovery of interest earned on the proceeds of the sale of property erroneously seized by the government. The Court's rationale was premised solely on "the nature of the account," a factor deemed irrelevant by the court of appeals in this case:

> [T]he claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession to be held, as the proceeds themselves are to be held, for the account of the Alien Property Custodian.

271 U.S. at 301. Thus, this Court simply applied the common sense principle that a claim for income derived from the investment of private property cannot possibly interfere with a governmental function and is not a claim against the United States for public funds or for funds as to which the United States claims a beneficial interest.

Indeed, the government could not claim the interest accruing on private property as its own without running afoul of another unequivocal ruling by this Court. More than fifty years after the *Henkels* decision, this Court ruled that interest on private money may not be converted into public money by *ipse dixit* in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). In *Webb's*, a sum of money, representing the amount at issue in litigation, was tendered to the Clerk of the Circuit Court of Seminole County, Florida. Pursuant to state statute, the fund was placed in an interest-bearing account.

Upon termination of the litigation, the prevailing party attempted to recover the interest that had accrued on the escrowed funds. This Court unanimously ruled that the prevailing party was entitled to the interest. The opinion first noted that "[t]he principal sum deposited in the registry of the Court plainly was private property, and was not the property of Seminole County." 449 U.S. at 160. The Court then stated that the escrow fund

> was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the Court and not for the benefit of the County.

449 U.S. at 161. The Court went on to hold that the principal did not lose its character as private property merely because it was in the temporary possession of the state, and that the interest earned on the principal was also private property:

> Neither the Florida Legislature by statute, nor the Florida Courts by judicial decree, may accomplish the result the County seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the Court. *The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.* The state statute has the practical effect of appropriating for the County the value of the use of the fund for the period in which it is held in the registry.
>
> To put it another way: A State by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in Court. This is the very kind of thing the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

449 U.S. at 164 (emphasis added).

To the extent the government claims the accrued interest on the overcharge-escrow funds as its own, the

net effect of the court of appeals' decision in this case will be the very result condemned by this Court in *Webb's*—the transformation of private money into public money by *ipse dixit* and the arbitrary use of governmental power to deprive petitioner of its property. The retention of the accrued interest on the overcharge-escrow funds by DOE would be as much a taking of private property as the attempted retention of interest by the Seminole County Circuit Court in the *Webb's* case.

In the instant case, the court of appeals did not address either *Henkels* or *Webb's*. Rather, the court of appeals relied upon two cases that are inapposite. Neither case involved escrowed funds to which the United States did not claim a beneficial interest that were actually deposited in an interest-bearing account for the benefit of their rightful owners. Rather, both cases relied upon by the court of appeals involved claims for interest that would expend themselves on the public treasury.

United States v. Louisiana, 446 U.S. 253 (1980), involved a thirty-year dispute between the federal government and the State of Louisiana over ownership of offshore mineral rights. During the pendency of the litigation, revenues from the disputed mineral interests were impounded, and the impounded funds were held in a separate account in the Treasury. When the State was finally awarded the bulk of the fund, it claimed that it was entitled to interest on the money because the United States had an implied duty to invest the impounded funds in order to earn interest. This Court held that Louisiana had acquiesced for more than twenty years in the failure of the United States to invest the impounded funds and that the United States had no duty, in any event, to invest the funds. Thus, *United States v. Louisiana*, involved the issue of whether there was a duty to invest escrowed funds in an interest-bearing account—not whether the owner of the funds has a right to accrued interest once the funds have been invested.

In *United States v. N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947), customs duties had been erroneously collected by the government. The funds were subsequently "deposited in the Treasury in a trust fund entitled 'Outstanding Liabilities 1938', pursuant to 31 U.S.C.A. § 725t" pending a determination of their rightful owner. *N.Y. Rayon Importing Co. v. United States*, 64 F. Supp. 684, 685 (Ct. Cl. 1946). When finally located, the owner of the funds sought to recover interest. This Court ruled that the claim for interest was barred by sovereign immunity. Significantly, however, neither this Court's opinion nor that of the Court of Claims stated that the funds had been held in an interest-bearing account, and the issue was not addressed. Rather, the issue considered by this Court was whether sovereign immunity barred recovery of interest against the United States—*i.e.*, a judgment that would expend itself on the public treasury. Accordingly, the Court did not even address *Henkels* much less overrule it.

Finally, it is significant that the governmental function at issue in the instant case is DOE's duty to distribute funds to rightful claimants. While the purpose of the sovereign immunity doctrine is to prevent interference with governmental functions, ironically, the expansion of the doctrine to bar recovery of accrued interest on escrowed funds may actually interfere with the effective functioning of government. In this case the Department of Energy delayed in complying with its own final orders for an unconscionably long period of time. The court below stated that "[t]he actions by DOE over the last five years in this and other matters have simply been beyond belief." Pet. App. at 7a. To the extent the decision below stands for the proposition that accrued interest on escrowed funds belongs to the government, it will be a signal to administrative agencies holding funds for private citizens that the longer they delay in reaching a resolution regarding disposition of the funds, the greater the benefit to the government because the govern-

ment will retain the interest that accrues on such funds. Thus, the effective functioning of government, one of the primary purposes served by the sovereign immunity doctrine, will be thwarted, not furthered, by expanding it to bar recovery of accrued interest on escrowed funds.

C. This Is An Important Area Of The Law That Should Be Addressed By This Court

The court of appeals' decision has a potentially far-reaching impact. While the *Henkels* case was decided more than sixty years ago, the status of interest earned on funds held by the United States has become an increasingly important issue because of the widespread use of escrow accounts by the federal courts and administrative agencies.

In the sixty years since the *Henkels* decision, the role played by the federal government in the economy in particular, and in society in general, has increased dramatically. Administrative agencies that did not exist in 1926, such as DOE and the Securities and Exchange Commission, routinely collect and hold large sums of money for the benefit of private parties.

One recent, and well publicized, example is the action taken by the Securities and Exchange Commission against Ivan Boesky. As a result of this action, Mr. Boesky was required to remit $100 million to the United States for alleged violations of the securities laws. Of this $100 million, $50 million was set aside to be held, in an interest-bearing account, for the benefit of persons injured by his alleged violations. *SEC v. Boesky*, No. 86 Civ. 8767 (S.D.N.Y. Nov. 14, 1986).[5] Another example

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[5] A copy of this unreported judgment has been lodged with the Court.

is the overcharge-escrow account involved in this very case, which still contains hundreds of millions of dollars earning interest and awaiting distribution.

Similarly, the role of federal courts as custodians of escrowed funds has become increasingly important under 28 U.S.C. §§ 2041, 2042, which establish the procedures for creating and administering escrow accounts in United States district courts. Since 1983, Fed. R. Civ. P. 67 has required funds deposited in court-administered escrow accounts to be placed in an interest-bearing account. Thus, it has become routine for federal courts and federal agencies to hold hundreds of millions of dollars in interest-bearing accounts for the benefit of private parties. The sovereign immunity doctrine should not be expanded to bar recovery of interest that accrues on such escrowed funds.

In sum, the decision below constitutes an unwarranted and unprecedented expansion of the sovereign immunity doctrine. The funds at issue are not government funds and the government has never claimed a beneficial interest in the principal. Moreover, because the principal had been deposited in an interest-bearing account for the benefit of rightful claimants, the accumulated interest has never been government property. To the extent DOE is now claiming the accumulated interest, however, DOE is engaging in a Fifth Amendment taking of the type condemned by this Court's ruling in *Webb's Fabulous Pharmacies*.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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Date: March 1987

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1134

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF OF AMICUS CURIAE CONSUMERS POWER COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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22pp

QUESTION PRESENTED

Whether the doctrine of federal sovereign immunity bars claims for interest on funds held by the United States under circumstances in which the funds (a) were collected from regulatory violators for the express purpose of compensating members of the claimant's class who were injured by those violations and (b) are held in an interest-bearing escrow account as to which the United States makes no claim of title.

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IN THE

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OCTOBER TERM, 1986

No. 86-1134

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
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Petitioners,

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UNITED STATES DEPARTMENT OF ENERGY and
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Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF OF AMICUS CURIAE CONSUMERS POWER COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

Consumers Power Company ("Consumers Power") respectfully submits this brief in support of Petitioners. At stake before this Court is the right of Consumers Power—and approximately one million gas customers—to receive $8.2 million of postjudgment interest, and a

greater amount of prejudgment interest, accruing on their own money while those funds were held by the government in escrow.

Consumers Power Company is a public gas and electric utility, regulated by the Michigan Public Service Commission, that supplies electricity and gas to a service area with more than 5.3 million residents throughout Michigan. During the period September 1973 through December 1979, Consumers Power owned and operated a synthetic natural gas ("SNG") plant at Marysville, Michigan (the "Marysville plant") at which it converted petroleum liquids, including Canadian plant condensate, into various petroleum products. The SNG produced at the Marysville plant was sold to the gas customers of Consumers Power. Under the applicable rate tariffs, Consumers Power is permitted to pass through to its customers increases in the costs of SNG feedstock and is required to pass through to its customers decreases in such costs.

Consumers Power and its customers have an interest in this Petition because, like Petitioners, Consumers Power established similar rights through a series of administrative and judicial decisions relating to the operation of the Marysville plant. Consumers Powers was deemed to be a "refiner" and thus eligible to participate in the federal government's Entitlements Program,[1] *Consumers Power Company*, Interpretation 1979-26, 45 Fed.

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[1] From 1974 until 1981, the United States, through the Department of Energy ("DOE") and its predecessor agency, the Federal Energy Administration ("FEA"), administered a Program designed to ensure that all refiners paid the same cost per barrel for crude oil even through crude oil prices varied under a multi-tiered system of price controls. Under this so-called Entitlements Program, refiners with greater than average access to low price domestic oil bought "entitlements" from refiners with less than average access to low cost crude. *See generally, Pasco, Inc. v. FEA*, 525 F.2d 1391 (TECA 1975).

Reg. 5664 (Jan. 24, 1980), and was found to be *required* to so participate, *Consumers Power Company v. DOE*, Civil Action No. 71-71112 (E.D. Mich., Sept. 8, 1982), at all times after November 1, 1974. *Consumers Power Company v. DOE*, 742 F.2d 1468 (TECA 1984). Like Petitioners, Consumers Power was placed in the exception relief class of refiners[2] due benefits from the entitlements program. Also like Petitioners, these entitlements benefits were ultimately paid[3] from crude oil overcharge funds collected from regulatory violators and held in an interest-bearing account by DOE.[4]

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[2] "Exception" relief was granted to certain firms in the Entitlements Program to "prevent special hardship, inequity or unfair distribution of burdens" which full participation may have caused. *See* § 504(a) of the Department of Energy Organization Act, 42 U.S.C. § 7194.

[3] While the Entitlements Program was operating, exception relief would be easily implemented via monthly entitlements notices. Recipients of exception relief would either have the number of entitlements they could sell increased or the number of entitlements they were required to purchase lowered. This mechanism for implementing exception relief no longer exists. On January 28, 1981, President Reagan ended the price and allocation regulations on all crude oil and petroleum products. Exec. Order No. 12,287. The monthly entitlements notice for January 1981 was then postponed by a series of federal court injunctions. A final "clean-up" entitlements notice implementing exception relief was proposed, 46 Fed. Reg. 36092 (July 13, 1981), delayed, and finally abandoned. 48 Fed. Reg. 50824 (Nov. 3, 1983). *See Texaco v. DOE*, 795 F.2d 1021 (TECA), *cert. dismissed*, 107 S. Ct. 10 (1986).

[4] DOE had collected over $200 million in principal from violators of crude oil pricing regulations, 50 Fed. Reg. 1919, 1921 (1985), and deposited them in an interest-bearing escrow account. DOE concluded that the overcharge escrow was an appropriate surrogate for the payment of relief under the Entitlements Program because refiners such as Petitioners and Consumers Power had suffered injury from the overcharge violations through the operations of the Program.

It has taken over nine years for Consumers Power to obtain disbursement of these funds from DOE's escrow account to compensate Consumers Power for the principal due it. This arduous process included several administrative decisions, several federal district court rulings and two appeals to the Temporary Emergency Court of Appeals.[5] DOE refused, however, to permit these funds to be used to compensate Consumers Power for DOE's wrongful delay in implementing the relief, asserting that an award of interest was barred by sovereign immunity.

DOE's refusal to make Consumers Power whole forced Consumers Power back to federal court where Consumers Power obtained an order entitling it to interest on the principal from September 8, 1982. *Consumers Power Company v. DOE*, Civ. Action No. 71-71112 (E.D. Mich., Aug. 14, 1985). DOE appealed that decision asserting the same arguments that were accepted by TECA in the case now before this Court. *Consumers Power Company v. DOE*, No. 6-35 (TECA 1985). As the Order attached as an appendix to this brief recites, the Court of Appeals has stayed that action pending the resolution by this Court of this case.

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[5] Indeed, DOE agreed to pay the principal only after TECA instructed it in a similar case that:

> We are of the opinion that the public interest is fundamentally against the delay imposed by DOE in this case, and as [sic] against the principles of good government and proper treatment of its citizens, including its corporate citizens, and that the public interest really cries out for the Congressional mandate of this case to be complied with, and be complied with within the reasonable time.

Navajo Refining Co. v. DOE, No. 10-62 (TECA Dec. 10, 1985) (Transcript of Proceedings at 45). In *Navajo*, TECA orally denied DOE's motion to stay disbursement of similar funds in an entitlements exception relief case closely similar to that before the Court.

STATEMENT OF THE CASE

The Court of Appeals was squarely presented with the issue of whether the accumulated interest on the escrow account was to be used to compensate private parties, such as Petitioners, or whether these earnings on private funds would be retained by the government. In assessing this question the Court of Appeals also had before it the long history of regulatory delay in effectuating relief due Petitioners. Indeed, the district court had characterized DOE as "a dishonest litigant" whose record of "playing fast and loose with federal courts across the United States" caused "delay-delay-delay." Pet. App. at 20a. The Court of Appeals itself surveyed the record of DOE procrastination and stated that "[t]he actions by DOE over the last five years in this and other matters have been simply beyond belief." Pet. App. at 7a.

Although acknowledging that "the equities all favor" the private parties, Pet. App. at 7a, the Court of Appeals, in effect, rewarded the government for its delaying tactics by barring the claim. The court did not deem relevant the fact that the award of interest would be made from private monies held in escrow by the government in an interest-bearing account for the benefit of private parties. Pet. App. at 9a. Nor did the court deem pertinent the fact that the government had never claimed a right to the money. *Id.* Rather, the court simply applied the doctrine of sovereign immunity "in a mechanical fashion," *id.*, and barred the claim, stating:

> [t]he Treasury has the money and the claim is against the United States to recover that money. This is sufficient to bring sovereign immunity into play.

Pet. App. at 9a. Petitioners have properly asked this Court to review the extension of the sovereign immunity doctrine to interest earned on private monies held in an interest-bearing escrow account for the benefit of private parties.

REASONS FOR GRANTING THE WRIT

Professional comment and criticism has been almost universal in calling for the abolition (or at least the restriction) of the doctrine of federal sovereign immunity. As stated by one commentator:

> It is the inherited wisdom of the American bar that responsible professional comment and criticism are the principal restraints upon judicial arbitrariness at the highest level and major influences in the continuing development of court-made law. If there is one legal development (or, perhaps more accurately, nondevelopment) found in the pages of the United States reports during the present century which would cause the most credulous observer to doubt the truth of this axiom, it is the continued good health of the doctrine of sovereign immunity.

Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public-Lands Cases*, 68 Mich. L. Rev. 867, 867 (1970). *See also* Davis, *Sovereign Immunity Must Go*, 22 Ad. L. Rev. 383 (1970).

This Court has long recognized that sovereign immunity "has not been favored by the test of time." *National City Bank v. Republic of China*, 348 U.S. 356, 359-60 (1955). The lower courts have also criticized the doctrine. *See, e.g., Keller v. Metropolitan County Board of Education*, 372 F. Supp. 528, 535 (M.D. Tenn. 1973) (sovereign immunity "should be abolished because it lacks a rational basis"). Accordingly, the doctrine "ought not to be extended" beyond the parameters of prior case law. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 723 (1949) (Frankfurter & Burton, JJ., dissenting). As stated by one commentator, expansion of federal sovereign immunity is "incredible in the conventionally hyperbolic sense." Scalia, *supra* at 869, n.6.

The Court of Appeals, in the face of this reasoned criticism, has effectively extended the doctrine of sover-

eign immunity to areas in which it has never before been applied and has ignored controlling precedent of this Court in so doing. For that reason, and because the ruling below involves an important issue, promising mischief in numerous other contexts, the Court should grant review.

I. Review Is Warranted Because The Decision Below Is Contrary To Controlling Precedent Of This Court.

This Court has frequently condemned "mechanical" applications of sovereign immunity of the sort engaged in below. *See, e.g., Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 521 (1984) (criticism of applying sovereign immunity according to "a ritualistic formula"); *Library of Congress v. Shaw*, 106 S. Ct. 2957, 2966 (1986) (Brennan, Marshall & Stevens, J.J., dissenting) (criticism of construing waivers of sovereign immunity "in a wooden and archaic fashion"). Rather, this Court has consistently instructed that evaluating a claim of sovereign immunity requires that a court assay the true effect of the judgment on the public fisc.

As stated by this Court, if "[t]he 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public domain, or interfere with the public administration," then "the suit is one against the sovereign." *Land v. Dollar*, 330 U.S. 731, 738 (1947) (citations omitted). *See also Dugan v. Rank*, 372 U.S. 609, 620 (1963) (suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration"). Stated differently, the test when money is at issue is whether "the suit is essentially one designed to reach money which the government *owns*." *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375 (1945) (emphasis added).

The "essential nature and effect" of this lawsuit is not to reach money (or anything else) which the government "owns." Indeed, DOE has disclaimed ownership of the funds in question. Rather, this case involves a claim for interest on money held by the government for persons of Petitioners' class. Ignoring this distinction, the Court of Appeals failed to apply the test long-established by this Court.

Indeed, this Court has applied the distinction between public funds and private funds held by the government in numerous cases indistinguishable from the case in hand. For example, in *Henkels v. Sutherland*, 271 U.S. 298 (1926), Henkels' stock was unlawfully seized, then sold with the proceeds being placed in interest-bearing securities. The Court held that Henkels was entitled to that interest, finding that case not "in the sense of the rule" prohibiting an award of interest against the United States. 271 U.S. at 301.

Similarly, in *Miller v. Robertson*, 266 U.S. 243 (1924), Robertson sued the United States to recover a debt owed by enemy aliens whose property was seized. This Court awarded interest in spite of claims of sovereign immunity reasoning that "[w]hile the suit . . . is one against the United States, the claim was not against it." 266 U.S. at 257.[6]

Nor do the two cases relied upon by the Court of Appeals abrogate this rule. In *United States v. Louisiana*, 446 U.S. 253 (1980), an agreement between Louisiana

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[6] The result below is also inconsistent with this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In *Webb's Fabulous Pharmacies*, the Court held that a state's claim to interest on private money tendered to the clerk of a state court and placed in an interest-bearing account for the ultimate benefit of private parties would run afoul of the Fifth Amendment. If government seizure of interest on private monies raises a taking issue, then sovereign immunity cannot logically be asserted in defense of a private party's claim for that interest.

and the United States placed revenues from certain disputed mineral leases in escrow pending resolution of ownership rights to those funds. Importantly, the parties neglected to put into the agreement any duty to invest the proceeds. Indeed, the record showed that Louisiana specifically decided not to insist on a duty to invest clause during the negotiations and acquiesced for many years by receiving regular reports showing that no interest was accumulating. 446 U.S. at 265. The Court's decision against an award of interest to Louisiana merely reflects a natural reluctance to read into freely negotiated contracts such a significant term.

Similarly, *United States v. N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947), involved a different type of account from that at issue in this case. In *Rayon*, disputed custom fees were collected and deposited in an apparently non-interest bearing account pending determination of whether these monies were rightfully collected. Subsequently, when the true owners sued to collect interest on the funds wrongfully held, this Court barred their claim under sovereign immunity. *Rayon* is silent as to whether the funds were earning interest or not. However, the Court's reference to "the *appropriation* statutes which cover the refunds here in issue," 329 U.S. at 659 (emphasis added), strongly suggests that the monies were *not* earning interest and that refunding with interest would drain appropriated funds. Thus, the *Rayon* holding is at the very heart of the doctrine of sovereign immunity and adopts the very rule which the Court of Appeals failed to apply.

II. This Court Should Grant Plenary Review Because The Issue Is Important And Likely To Recur.

Not only was the decision below inconsistent with prior decisions of this Court, the ruling promises to work substantial mischief in other contexts. The government acts as trustee of large escrow accounts under numerous other federal statutes, all of which are silent as to the issue of

interest. The question decided below is thus likely to arise again in other contexts and should be put to rest now.

For example, under the terms of Pub. L. No. 98-473, 98 Stat. 2175 (1984), after a defendant is convicted of a crime resulting in physical harm, a court may seize the payments received by the criminal from the sale of stories depicting the crime and retain these funds in escrow for five years in the Crime Victims Fund in the treasury. 18 U.S.C. § 3671(a). Victims of the crime or the United States may then levy the funds to satisfy money judgments or fines. 18 U.S.C. § 3671(e). Yet, no provision is made for the recovery of interest.

Similarly, under the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985), states with a radioactive waste disposal facility can impose surcharges on other states using the facility. 42 U.S.C. § 2021e(d)(2)(A). Twenty-five percent (25%) of these monies would be placed in an interest-bearing escrow account to be refunded to states meeting certain "mileposts" in developing their own facilities. Any remaining funds would be returned to the states imposing the surcharge. There is also no provision for the payment of interest on this escrow.

Perhaps the closest modern analog to the wrongful seizure cases, discussed *supra*, can be found in the Justice Assets Forfeiture Fund. Under 28 U.S.C. § 524(c), a special fund was established in the United States Treasury into which the Attorney General would deposit the proceeds of seized property. Significantly, there is no duty to invest the fund as it can be "kept on deposit *or* invested." 28 U.S.C. § 524(c)(5) (emphasis added). The fund can be used to pay valid liens and mortgages against property forfeited "subject to the discretion of the Attorney General to determine . . . the amount of payment." 28 U.S.C. § 524(c)(1)(C). The statute is silent on the recovery of interest on liens on property

wrongfully seized. Importantly, disputes on the recovery of post-seizure mortgage interest due innocent lienholders on seized property have already surfaced with the lower courts reaching inconsistent results. *Compare United States v. All That Tract & Parcel of Land*, 602 F. Supp. 307 (N.D. Ga. 1985) (holding that innocent lienholders on seized property entitled to interest accruing after date of seizure) *with United States v. One Piece of Real Estate*, 571 F. Supp. 723 (W.D. Tex. 1983) (holding that innocent lienholders on seized property *not* entitled to post-seizure interest).

Finally, the federal courts themselves have become temporary holders of large escrow amounts. Under 28 U.S.C. §§ 2041, 2042, the federal courts administer escrow monies which, since 1983, are placed in interest-bearing accounts. *See* Fed. R. Civ. P. 67. Claims on funds held by federal courts have also raised the issue of the application of the doctrine of sovereign immunity. *See, e.g., Bank of Hawaii v. Benchwick*, 249 F. Supp. 74, 78 (D. Hawaii 1966) (claim by bank to cash deposited as bail with court not barred by doctrine of sovereign immunity "for the United States has not proprietary rights in cash deposited as security for bail").

Given the existence of these escrow statutes, claims for interest on these funds, nominally against the sovereign, can be expected to raise the defense of the doctrine of sovereign immunity. For this reason as well, the Court should grant review of the decision below.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 6-35

CONSUMERS POWER COMPANY,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Defendants-Appellants.

[Filed May 30, 1986]

Before: GRANT, PECK, and MAXWELL, Judges.

ORDER

This appeal involves the August 14, 1985 final order of the United States District Court for the Eastern District of Michigan which directed defendants-appellants, the United States Department of Energy [hereinafter referred to as DOE], to place in escrow benefits owed to plaintiff-appellee, Consumers Power Company [hereinafter referred to as Consumers], pursuant to DOE's entitlements program, 10 C.F.R. # 211.67, and to add to this amount interest from and including September 8, 1982, the date of the original disposition of the merits of this case, until the date the escrow was established. We stayed the appeal pending the district court's decision on DOE's request to amend the judgment with re-

spect to the grant of postjudgment interest. The district court denied DOE's request on January 31, 1986, and simultaneously ordered further briefing on whether prejudgment interest ought to be added to Consumers' entitlements payment. The parties have agreed to be bound on the prejudgment interest issue by a final decision in *VGS Corporation d/b/a Southland Oil Company v. Department of Energy*, No. 5-119 (Temp. Emer. Ct. App.) which is scheduled for oral argument on June 4, 1986. DOE has deposited the disputed amount of prejudgment interest into escrow pending the resolution of this issue.

This matter now comes before this Court on DOE's Motion for Further Stay of Proceedings and Consumers' opposition to DOE's motion. Because the issue of prejudgment interest will likely be appealed, because that issue and the issue of postjudgment interest raise similar considerations, and because the issue of prejudgment interest will be resolved in a very short time, it is

ORDERED that DOE's motion to stay proceedings is granted. The parties should advise this Court by June 30, 1986, and each three-month period thereafter, as to the status of the prejudgment interest question in the district court.

Entered: 28 May 1986

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

(5)

No. 86-1134

Supreme Court, U.S.
FILED
APR 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

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Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1134

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioners VGS Corporation, d/b/a Southland Oil Company, and Globe Asphalt Co., Inc. ("Southland") submit this Reply Brief pursuant to Rule 22.5 of the Rules of this Court.

ARGUMENT

I. CONTRARY TO THE GOVERNMENT'S ASSERTION, THE APPLICABILITY OF SOVEREIGN IMMUNITY IS DETERMINED BY THE EFFECT OF THE JUDGMENT, NOT THE IDENTITY OF THE PARTIES

The Department of Energy ("DOE") urges in its Opposition that simply because Southland's suit is against an agency of the United States government, an award of

interest to Southland is barred by sovereign immunity unless the government has consented to the payment sought. Opp. at 10.

DOE is in error: the mere naming of an agency or officer of the United States government as a defendant has never been the sole determinant of whether the sovereign immunity doctrine applies. In *Miller v. Robertson*, 266 U.S. 243 (1924), for example, the Court held sovereign immunity inapplicable to an award of interest in a suit brought against two officers of the United States government: the Alien Property Custodian and the Treasurer of the United States. The Court held that "[w]hile the *suit* . . . is one against the United States, the *claim* was not against it." *Id.* at 257 (emphasis added). Since *Miller*, this Court repeatedly has held that the application of the sovereign immunity doctrine turns not on "the denomination of the party defendant," *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949), but rather on the "essential nature and effect of the proceeding." *Land v. Dollar*, 330 U.S. 731, 738 (1947) (citations omitted). Thus, the sovereign immunity issue here is not whether Southland's *suit* is against the United States, but whether its *claim*, considering its nature and effect, would operate against the sovereign. As the following discussion demonstrates, DOE's Opposition distorts the nature and effect of Southland's interest claim.

II. BY MISCHARACTERIZING THE OVERCHARGE FUNDS FROM WHICH SOUTHLAND'S INTEREST WOULD BE PAID, THE GOVERNMENT HAS MISAPPLIED THE PRINCIPLES OF SOVEREIGN IMMUNITY ESTABLISHED BY THIS COURT

Until its attempt to raise the shield of sovereign immunity before this Court, DOE had consistently taken the position that it had "no pecuniary interest" in the crude oil overcharge funds from which Southland's interest would be paid, *see Coline Gas Corp.*, 9 DOE

¶ 82,508, at 85,052 (1981), and that those moneys "are not public funds." *Placid Refining Co.*, 14 DOE ¶ 85,111, at 88,199 n.1 (1986). It now makes the contrary assertion: "[t]he prejudgment interest petitioners claim would have to be paid out of money that would otherwise belong to the federal government and remain in the treasury." Opp. at 10.

In support of this revisionist view of the overcharge funds, DOE relies upon the provisions of the settlement agreement approved in *In re DOE Stripper Well Exemption Litigation*, M.D.L. No. 378 (D. Kan.). DOE argues that since the federal government received a portion of the overcharge funds under the agreement and since the agreement commits DOE to pay exception relief and any court-ordered interest on such relief from "its share" of the overcharge funds, Southland's claim on the overcharge funds is barred by sovereign immunity. Opp. at 10-11.

Contrary to the representations in DOE's Brief, the interest claims of exception relief recipients will not be paid from the general fund of the U.S. Treasury under the *Stripper Well* settlement. As the District Court wrote in approving the settlement, "[f]unds received by the DOE will be deposited in the United States Treasury *or will be held in reserve* to meet the DOE's obligation to fund entitlements exception relief." *In re DOE Stripper Well Exemption Litigation*, 653 F. Supp. 108, 113 (D. Kan. 1986) (emphasis added).

DOE also neglects to tell this Court that the legality of the federal government's claim on the *Stripper Well* overcharge funds depends entirely on its position as a legitimate proxy for the millions of private consumers who were injured by crude oil overcharges but whose individual claims on the funds could not be determined. In the *Stripper Well* proceeding, after the Temporary Emergency Court of Appeals ("TECA") determined

that crude oil producers were liable for stripper well overcharges,[1] the District Court's task on remand was to determine how best to effect restitution of the funds to private parties who were injured by the overcharges, a proceeding which the Court described as "a monumental interpleader action. . . ." *In re DOE Stripper Well Exemption Litigation*, 578 F. Supp. 586, 589 (D. Kan. 1983). In approving the settlement, the District Court wrote, "TECA's decision made it clear that the escrow funds represented crude oil overcharges and would need to be distributed *to or for the benefit of injured parties.*" *In re DOE Stripper Well Exemption Litigation*, 653 F. Supp. at 110 (emphasis added). The District Court approved the payment of a portion of the overcharge funds to the federal government, not because the government itself was an injured party, but rather as an indirect means of making whole injured consumers. Thus, the Court described the settlement as providing "a major portion of the funds to the States and to the federal government *on behalf of the consuming public.*" *Id.* at 116 (emphasis added). In its "Statement of Modified Restitutionary Policy," issued to implement the *Stripper Well* settlement, DOE itself interpreted the Agreement as providing for payment of overcharge funds to the States and the Federal government "as representatives of the energy consuming public." 51 Fed. Reg. 27899, 27900 (Aug. 4, 1986).

Thus, the *Stripper Well* settlement strongly supports petitioners' argument that the overcharge funds are not properly considered public funds, but rather private funds held by the government as custodian for ultimate distribution to injured parties. The government's assertion that it was resisting petitioners' claim to the overcharge funds "on its own behalf" (Opp. at 14) distorts

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[1] *See In re DOE Stripper Well Exemption Litigation*, 690 F.2d 1375 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 1127 (1983).

its legal relationship to those funds. The government could not assert a right to those funds "on its own behalf," but rather only on behalf of a class of injured private parties to whom payment of overcharge funds to the government would constitute indirect restitution.[2]

Significantly, DOE comes close to conceding its merely custodial relationship to the overcharge funds when it argues that the government had a "claim" on the overcharge funds "insofar as it had a duty to ensure that they were paid to the proper party" and was resisting petitioners' claim to those funds in the exercise of that duty. Opp. at 14. In so describing its relationship to the overcharge funds, DOE puts this case on all fours with this Court's decisions in *Miller v. Robertson*, *supra* and *Henkels v. Sutherland*, 271 U.S. 298 (1926), in which the Court affirmed awards of interest accruing on escrowed funds in the possession of the federal government. In those cases, as here, the government had a duty to ensure that the escrowed funds were distributed to parties with legitimate claims on those funds. In those cases, as here, the government resisted the payment of accrued interest on those funds to a party already determined by the government to have such a claim. The government's traditional immunity from interest liability was held inapplicable in *Miller* and *Henkels*. It is equally inapplicable here.[3]

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[2] Indeed, the government could not claim the *Stripper Well* interpleader funds, or any other overcharge funds, on its own behalf without raising the identical Constitutional problem addressed by this Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In that case, the Court held that the State of Florida could not claim for itself interest which had accrued on a court-escrowed interpleader fund because to do so would have transformed, by *ipse dixit*, private property into public property without compensation in violation of the Fifth Amendment to the Constitution.

[3] DOE's efforts to distinguish *Miller* and *Henkels* (Opp. at 12-13 n.6) are unavailing. The Department's uncertainty as to

The government's relationship to the overcharge funds distinguishes this case from *United States v. N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947). Unlike the overcharge funds and the seized enemy assets in *Miller* and *Henkels*, the customs duties in *N.Y. Rayon* were collected not for the benefit of private claimants, but for the federal government alone. As such, the government recognized no obligation to invest those funds for the benefit of others and there is no indication in the Court's opinion, or in the lower court opinions, that any interest had accrued on the funds while they remained in the government's possession.[4] In contrast, both DOE and the courts have recognized DOE's obligation to invest the overcharge funds and to distribute to proper claimants their share of the interest accrued.[5] Here, the funds

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whether the government, as opposed to the enemy defendants, had to pay the interest award in *Miller* is answered by the opinion itself: "The enemy defendants did not appear in the case; and it has been stipulated that the decree will not be enforced against them personally." 266 U.S. at 247. DOE's further comment that the plaintiff's claim in *Miller* was not against the United States merely echoes petitioners' argument that in *Miller*, as here, although the suit was against the United States, the plaintiff's claim was not. DOE also suggests that *Henkels* is somehow distinguishable because Southland's interest claim is for a period prior to DOE's October 1985 internal accounting decision to transfer funds necessary to pay Southland's adjudicated exception relief to a separate escrow. DOE ignores the fact that the overcharge funds from which the Southland exception relief money was segregated had themselves been earning interest long before October 1985. *See* note 5 *infra*. Thus, in this case, as in *Henkels*, the funds involved had been invested by the government and the government withheld from the plaintiff the interest that had accrued.

[4] Indeed, if the effect of *N.Y. Rayon* was to permit the government to retain for itself interest that actually accrued on the customs duties after the determination that the duties did not belong to the government, this result would be inconsistent with this Court's later ruling in *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra*. *See* note 2 *supra*.

[5] The DOE regulations governing distribution of refunds to injured parties from the overcharge funds provide for placement

were invested and interest was earned. This also distinguishes *United States v. Louisiana*, 446 U.S. 253 (1980), in which the United States was held not liable for interest payments on disputed lease revenues precisely because those revenues were not invested and neither its escrow agreement with Louisiana nor anything else imposed a duty on the United States to invest those proceeds.

DOE can cite no case in which this Court has invoked the sovereign immunity doctrine to bar an interest award to be paid from funds collected and invested by the government solely for the benefit of others. In *Miller* and *Henkels*, this Court refused to do so. TECA's holding is therefore an unprecedented and unwarranted expansion of the sovereign immunity doctrine.

The sovereign immunity issue in this case is raised every time the government acts as a custodian, stakeholder or trustee as to funds which it is holding for the benefit of rightful private claimants. As described in Southland's Petition[6] and in the supporting *amicus curiae* briefs,[7] the government's custodial role recurs in

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of the funds in "an appropriate interest-bearing account," 10 C.F.R. § 205.287 (1986), and for payment of refunds "plus any accumulated interest." 10 C.F.R. § 205.286 (1986). Moreover, TECA has held that DOE has a statutory duty to refund overcharge monies to injured parties "with interest." *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 723 (Temp. Emer. Ct. App.), *cert. denied*, 459 U.S. 877 (1982). The *Stripper Well* escrow itself contained millions of dollars in accrued interest which ultimately was distributed through the settlement agreement on which DOE relies. *See In re DOE Stripper Well Exemption Litigation*, 578 F. Supp. at 589.

[6] *See* Petition for Writ of Certiorari at 18 n.12, *VGS Corp. v. DOE* (No. 1134).

[7] *See* Brief of Amicus Curiae Beacon Oil Company in Support of Petition for Writ of Certiorari at 15-16, *VGS Corp. v. DOE* (No. 1134); Brief of Amicus Curiae Consumers Power Company in Support of Petition for Writ of Certiorari at 9-11, *VGS Corp. v. DOE* (No. 1134).

a variety of policy contexts, ranging from the regulation of radioactive waste, to the compensation of crime victims, to the administration of escrow accounts by courts themselves. The Court of Appeals' decision in this case is an invitation to the government to invoke the sovereign immunity doctrine to bar any claim for interest accruing on such accounts made by those for whose benefit the funds are held. The holding below therefore has implications reaching far beyond the particular regulatory context in this case.

III. THE GOVERNMENT HAS MISINTERPRETED THE SCOPE OF THE 1976 AMENDMENT OF THE ADMINISTRATIVE PROCEDURE ACT ABOLISHING THE SOVEREIGN IMMUNITY DEFENSE IN ACTIONS OTHER THAN FOR MONEY DAMAGES

The government maintains that the broad abolition of the sovereign immunity defense in the 1976 amendment to § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (1982), does not apply here, citing the statutory exclusion from chapter 7 of the APA for "functions exercised under" the Emergency Petroleum Allocation Act ("EPAA"). *See* 12 U.S.C. § 1904 note (1982), as incorporated by 15 U.S.C. § 754 (1982).

The problem with DOE's argument is that the granting of exception relief from the entitlements program, or any other EPAA program, was not a "function exercised under" the EPAA, but rather was done pursuant to the mandate of § 504(a) of the Department of Energy Organization Act to make "adjustments" to the EPAA programs where necessary to alleviate "special hardship, inequity, or unfair distribution of burdens." 42 U.S.C. § 7194(a) (1982). Indeed, DOE admitted the applicability of the APA to its exception relief function when it argued to the District Court that "the only limitation . . . on the agency's discretion as to when Southland . . . would actually receive [exception relief] funds is con-

tained in the Administrative Procedure Act." Defendants' Response to Plaintiffs' Motion for Summary Judgment at 4, *VGS Corp. v. DOE* (S.D. Miss., filed Aug. 19, 1985) (No. J81-0170(B)). The District Court found DOE's inaction on Southland's relief to violate both the Department of Energy Organization Act and the APA (Appendix at 23a) and DOE did not appeal that ruling.

DOE's additional argument that Southland's claim for interest is a claim for "damages" also contradicts the agency's position below. Before TECA, DOE argued that Southland's suit was a claim for "regulatory relief," not "damages." Brief of Defendants-Appellants at 23, *VGS Corp. v. DOE* (Temp. Emer. Ct. App., filed Jan. 31, 1986) (No. 5-119). DOE cannot have it both ways. If Southland's claim for exception relief was not for damages, then neither is its claim for the interest that accrued on that relief during the period of DOE's inaction. Moreover, if this were a claim for damages against the government, it presumably would be paid from public funds. As argued above, Southland's interest claim, just as its exception relief, would be paid from funds acquired by the government only for the benefit of private parties with legitimate claims under the regulatory program.

Petitioners do not claim that the 1976 APA Amendment affects the traditional rule, articulated by this Court most recently in *Library of Congress v. Shaw*, 106 S. Ct. 2957 (1986), that sovereign immunity bars the recovery of interest as an element of damages against the United States without the government's consent. Petitioners claim rather that § 702 of the APA means exactly what it says: sovereign immunity is not a defense in any suit against an agency or officer of the United States government "seeking relief *other than money damages*. . . ." 5 U.S.C. § 702 (1982) (emphasis added). Since this is not a suit for money damages, sovereign immunity is no defense.

By invoking sovereign immunity against Southland's claim, TECA frustrated the purpose of the 1976 APA Amendment to strengthen available private remedies against governmental misconduct. Even now, DOE refuses to face the reality of its own wrongdoing, writing that the lower courts merely "expressed dismay" at its procrastination (Opp. at 16 n.8), in the face of a District Court holding that DOE's failure to restore Southland's relief was "totally frivolous" (Appendix at 20a) and a TECA opinion finding its actions "simply . . . beyond belief." Appendix at 7a. This case is one of gross governmental misconduct for which a remedy has been denied due to the assertion of sovereign immunity. This is precisely the result Congress sought to avoid in its 1976 Amendment of § 702.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 17, 1987